

# SUPPLEMENT

TO

# THE CODE OF IOWA

CONTAINING

ALL THE LAWS OF A GENERAL AND PERMANENT NATURE

ENACTED BY

THE TWENTY-SEVENTH, TWENTY-EIGHTH AND TWENTY-NINTH  
GENERAL ASSEMBLIES, WITH COMPLETE ANNOTATIONS  
TO THE CODE AND SUPPLEMENT, DOWN TO, AND  
INCLUDING THE DECISIONS RENDERED  
AT THE MAY TERM, 1902, OF  
THE SUPREME COURT.

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## PREFACE.

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

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

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

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

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

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*Committee.*

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

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

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

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

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

JOHN R. CARTER.

Sioux City, Iowa, September, 1902.

## A TABLE

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

### THE TWENTY-SEVENTH GENERAL ASSEMBLY.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
1	An act to amend chapter 20 of laws of the extra session of the twenty-sixth general assembly..... Took effect July 4, 1898.		p. 3
2	An act to repeal section 41 of the code, and enact a substitute therefor, relating to the amendment and repeal of acts of the general assembly..... Took effect by publication, April 8, 1898.		41-a
3	An act to amend section 104 of the code, relating to interest on state warrants..... Took effect by publication, April 8, 1898.		104
4	An act to amend section 126 (chapter 5, title II) of the code, relating to public printing and binding and distribution of documents..... Took effect by publication, April 5, 1898.		126
5	An act to repeal section 144 of the code, relating to public printing and binding..... Took effect by publication, February 17, 1898.		144-a
6	An act to amend chapter 6, title II, of the code..... Took effect July 4, 1898.		152-a
7	An act to amend section 152 of the code, authorizing the executive council to use committee rooms for office purposes Took effect by publication, April 6, 1898.		152
8	An act to amend chapter 7, title II, of the code, relating to the executive council..... Took effect by publication, April 5, 1898.		170-a
9	An act amending title III of the code, relating to courts of record, and the use of shorthand notes as evidence..... Took effect by publication, March 10, 1898.		245-a
10	An act to amend section 227 of the code and provide an additional judge for the twelfth judicial district..... Took effect by publication, April 6, 1898.	1 2 3	227 227-a 227-b
11	An act to amend section 227 of the code, and increase the number of district judges in the eighteenth judicial district.. Took effect July 4, 1898.	1 2	227 227-c
12	An act to amend section 298 (chapter 8, title III) of the code, relating to compensation of clerks..... Took effect by publication, February 10, 1898.		298
13	An act prohibiting members of boards of supervisors and township trustees from making contracts with their respective townships or counties..... Took effect July 4, 1898.		468-a

## THE TWENTY-SEVENTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
14	An act to define the jurisdiction of courts in counties bordering on the Missouri river..... Took effect by publication, April 13, 1898.		395 a
15	An act to amend section 407 of the code, relating to the redemption of county bonds..... Took effect by publication, April 7, 1898.		407
16	An act to amend section 490 (chapter 4, subdivision 5, title IV) of the code, relating to the compensation of county treasurers..... Took effect July 4, 1898.		490
17	An act to amend section 511 of the code, relating to fees and compensation of sheriffs..... Took effect by publication, January 29, 1898.		511
18	An act to amend section 654 (chapter 2, title V) of the code, relating to appointment of police matrons..... Took effect by publication, March 10, 1898.		654
19	An act to amend section 683 of the code, relating to the appropriation of money in towns..... Took effect July 4, 1898.		683
20	An act amendatory to chapter 4, title V, of the code, relating to general powers of cities and towns..... Took effect July 4, 1898.		716-a
21	An act to amend section 700 of the code, relating to the power of cities to regulate, license and tax certain kinds of business Took effect July 4, 1898.		700
22	An act to amend sections 696, 700, and 737 (chapter 4, title V) of the code, relating to the general powers of cities and towns Took effect July 4, 1898.	1 2 3	696 700 737
23	An act to amend sections 742, 744, 745 and 747 (chapter 5, title V) of the code, relating to the purchase and construction of waterworks..... Took effect by publication, March 26, 1898.	1 2 3 4	742 744 745 747-a
24	An act to amend section 814 of the code, relating to street improvements..... Took effect by publication, April 7, 1898.		814
25	An act to amend sections 850 and 859 of the code, relating to election of park commissioners..... Took effect by publication, February 10, 1898.	1 2	850 859
26	An act to amend section 859 (chapter 9, title V) of the code, relating to park commissioners and board of public works.. Took effect by publication, March 1, 1898.		859
27	An act to amend sections 891 and 892 (chapter 11, title V) of the code..... Took effect July 4, 1898.	1 2	891 892
28	An act to amend sections 952, 953, 958, 971, 979 and 1020 of the code, relating to cities under special charters..... Took effect July 4, 1898.	1 3 4 5 6	952 971 958 979 1020
29	An act to amend subdivision 12, of section 1005, of the code, relating to cities under special charters levying a special bridge tax..... Took effect July 4, 1898.		1005

THE TWENTY-SEVENTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
30	An act to amend sections 1305, 1321, 1360, 1361 and 1372 of the code, relating to assessment rolls..... Took effect July 4, 1898.	1 2 3 4 5	1305 1321 1360 1361 1372
31	An act to amend section 1346 of the code, relating to taxation of express companies..... Took effect July 4, 1898.		Repealed
32	An act to repeal section 1347 of the code, relating to taxing of peddlers, and enact a substitute therefor..... Took effect by publication, April 9, 1898.		1347-a
33	An act to amend section 1371 of the code, relating to duties of township, city and town assessors..... Took effect by publication, February 23, 1898.		1371
34	An act to provide for the general levy for state purposes, and to repeal section 1380 of the code..... Took effect July 4, 1898.	1-3 4	1380-b-1380-d 1380-a
35	An act to amend section 1436 of the code, relating to redemption of land from tax sale..... Took effect July 4, 1898.		1436
36	An act to amend section 1457 of the code, relating to the security of the revenue, and to permit counties to receive interest on moneys deposited in banks..... Took effect July 4, 1898.		1457
37	An act to amend chapter 4, title VII of the code, relative to the assessment and collection of the collateral inheritance tax..... Took effect by publication, April 8, 1898.	1 2-4 5 6 7	1476 1477-a, 1477-c 1479-a 1476-b 1477-d
38	An act amendatory to chapter 2, title VIII, of the code, relating to working roads..... Took effect July 4, 1898.		Repealed.
39	An act to amend section 1562 of the code, relating to the destruction of thistles..... Took effect July 4, 1898.		1562
40	An act to amend section 1610 (chapter 1, title IX) of the code, relating to corporations for pecuniary profit..... Took effect by publication, April 8, 1898		1610
41	An act to amend section 1610 of the code and to encourage the production of sugar from beets grown in the state..... Took effect July 4, 1898.		1610
42	An act to repeal section 1654 of the code and enact a substitute therefor..... Took effect July 4, 1898.		Repealed
43	An act to repeal section 1661 (chapter 3, title IX) of the code, relating to agricultural societies, etc., and enact a substitute therefor..... Took effect July 4, 1898.		1661-a
44	An act to amend section 1744 of the code relating to proofs of loss under contracts of insurance..... Took effect by publication, April 8, 1898.		1744
45	An act to amend section 1752 (chapter 4, title IX) of the code, relating to insurance other than life..... Took effect by publication, April 8, 1898.		1752
46	An act to amend section 1782 of the code relating to life insurance companies and associations..... Took effect July 4, 1898.		1782

## THE TWENTY-SEVENTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
47	An act to amend section 1832 of the code relating to the issuing of state auditor's certificates to fraternal beneficiary societies, orders, etc..... Took effect by publication, April 13, 1898.		1832
48	An act to amend section 1898 of the code, relating to building and loan associations..... Took effect by publication, March 9, 1898.		1898
49	An act to amend section 2071 (chapter 5, title X) of the code, relating to liability for injuries to employes..... Took effect July 4, 1898.		2071
50	An act to amend chapter 5, title X, of the code, relating to the regulation of automatic couplers..... Took effect by publication, January 29, 1898.		2080
51	An act relating to certain fines and penalties provided for by section 2083 of the code, pertaining to automatic couplers.. Took effect by publication, March 1, 1898.	1 2	2083-a 2083-b
52	An act amendatory to title XII of the code, relating to the police of the state..... Took effect July 4, 1898.	1-5	2510-a-2510-e
53	An act to prohibit the bringing into the state of any nursery stock infested with the San Jose scale; to provide punishment therefor, and prevent its spread within the state..... Took effect July 4, 1898.	1-6	2575-c-2575-h
54	An act repealing section 2291 of the code, relating to compensation for keeping patients in insane hospitals, and to enact a substitute therefor..... Took effect July 4, 1898.		2291-a
55	An act to amend section 2308 (chapter 2, title XII) of the code, relating to tax levy for county insane fund..... Took effect July 4, 1898.		2308
56	An act to amend section 2386 of the code, relating to registered pharmacists..... Took effect by publication, April 13, 1898.		2386
57	An act to amend section 2392 of the code, relating to the change of place of conducting pharmacy..... Took effect by publication, March 1, 1898.		2392
58	An act to amend section 2400 of the code, relating to revocation of pharmacists' permit..... Took effect by publication, April 8, 1898.		2400
59	An act to amend section 2488 of the code, relating to the ventilation of mines..... Took effect July 4, 1898.		2488
60	An act to amend chapter 9, title XII, of the code, relating to the use of oil in coal mines..... Took effect by publication, April 7, 1898.	1 2	2494 2495-a
61	An act to amend section 2503 of the code, relating to the inspection of petroleum products..... Took effect by publication, April 5, 1898.		2503
62	An act to amend section 2508 of the code, relating to the specific gravity and inspection of petroleum products..... Took effect by publication, April 13, 1898.		2508
63	An act to amend section 2536 (chapter 14, title XII) of the code, in relation to the state veterinary surgeon..... Took effect July 4, 1898.		2536

THE TWENTY-SEVENTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
64	An act amending sections 2539, 2540 and 2559 of the code, relating to the care and propagation of fish and the protection of birds and game..... Took effect by publication, April 8, 1898.	1	2539
		2	2540
		3	2559
		4	2540
65	An act for the protection of deer, elk and goats, and to provide punishment for the violation thereof..... Took effect July 4, 1898.	1	2551-a
		2	2551-b
66	An act to amend section 2551 of the code, relating to the protection of game..... Took effect July 4, 1898.		2551
67	An act to amend section 2564 (chapter 16, title XII) of the code, relating to the state board of health..... Took effect by publication, April 5, 1898.		2564
68	An act to amend section 2583 (chapter 17, title XII) of the code, relating to the practice of medicine..... Took effect by publication, March 24, 1898.		2583
69	An act to regulate the practice of osteopathy in the state of Iowa..... Took effect July 4, 1898.		Repealed
70	An act to amend section 2589 of the code, relating to examinations for registration as pharmacists..... Took effect by publication, April 13, 1898.		2589
71	An act to amend section 2597 of the code, relating to the practice of dentistry..... Took effect July 4, 1898.		Repealed
72	An act to amend section 2608 of the code, relating to the support of the soldiers' home..... Took effect July 4, 1898.		2608
73	An act to repeal section 2634 of the code, relating to the state board of educational examiners, and to enact a substitute therefor..... Took effect July 4, 1898.		2634-a
74	An act fixing the salary of the chief executive officers of certain state institutions, and defining the qualifications of the superintendent of the school for the deaf..... Took effect July 4, 1898.		2727-c
75	An act to amend section 2644 (chapter 3, title XIII) of the code relating to state university..... Took effect July 4, 1898.		2644
76	An act to amend sections 2646 and 2650 (chapter 4, title XIII) of the code, relating to the state college of agriculture and mechanic arts..... Took effect by publication, April 6, 1898.	1	2646
		2	2650
77	An act to amend section 2682 of the code, relating to the normal school at Cedar Falls, Iowa..... Took effect July 4, 1898.		2682
78	An act to amend the title of chapter 6, title XIII, and to amend sections 2683, 2685, 2688, and 2692 of said chapter, relating to the orphans' home and home for destitute children, atavenport, Iowa..... Took effect by publication, April 8, 1898.	1	Title
		2	2683
		3	2685
		4	2688
		5	2692
79	An act to amend section 2700 of the code, relating to the institution for feeble-minded children..... Took effect by publication, April 13, 1898.	1	2700
		2	2700-a

THE TWENTY-SEVENTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
80	An act to amend sections 2708, 2709 and 2711 (chapter 8, title XIII) of the code, relating to the discharge of boys and girls from industrial schools..... Took effect by publication, April 8, 1898.		Repealed
81	An act amending section 2713 of the code, relating to the support of the industrial school..... Took effect July 4, 1898		2713
82	An act to amend section 2718 of the code, relating to the support of the college for the blind..... Took effect July 4, 1898.		Repealed
83	An act amending section 2727 of the code, relating to the support of the school for the deaf..... Took effect July 4, 1898.		Repealed
84	An act to amend sections 2728, 2730, 2731 and 2732 and repeal section 2733 of the code, relating to county high schools, and to enact a substitute therefor..... Took effect July 4, 1898.	1 2 3 4 5	2728 2730 2731 2732 2733-a
85	An act to amend section 2734 of the code, relating to the qualifications of county superintendents..... Took effect July 4, 1898.		2734
86	An act to amend sections 2736 and 2737 (chapter 13, title XIII) of the code, relating to county superintendents..... Took effect July 4, 1898.	1 2	2736 2737
87	An act to amend section 2738 of the code, relating to the disbursement of the institute fund..... Took effect July 4, 1898.		2738
88	An act to require boards of school directors to fence school-house sites..... Took effect July 4, 1898.	1 2	2745-a 2745-b
89	An act to empower boards of directors of school corporations to change boundary lines between such corporations in certain cases..... Took effect July 4, 1898.		2793-a
90	An act to provide for the sale and distribution of the school laws of Iowa..... Took effect July 4, 1898.	1-4	2823-j-2823-m
91	An act to amend sections 2744 and 2754 of the code, relating to the names of school corporations and the election of directors therein..... Took effect by publication, February 19, 1898.	1 2	2744 2754
92	An act to amend section 2752 of the code, relating to boards of directors of school townships..... Took effect July 4, 1898.		2752
93	An act to amend section 2754 of the code of Iowa, relating to term of office of school treasurers..... Took effect by publication, February 18, 1898.		2754
94	An act to amend section 2808 of the code, providing for the distribution of common funds in the hands of the county treasurer..... Took effect July 4, 1898.		2808
95	An act to amend sections 2812 and 2813 of the code, relating to the issuing of bonds by school corporations, and levying of taxes for the payment thereof..... Took effect July 4, 1898.	1 2	Repealed 2813

THE TWENTY-SEVENTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
96	An act to amend section 2942 (chapter 6, title XIV) of the code, relating to conveyance of real estate..... Took effect by publication, March 1, 1898.		2942
97	An act to amend section 2943 of the code, relating to taking and certifying of acknowledgments..... Took effect by publication, April 8, 1898.		2943
98	An act to amend section 2979 (chapter 8, title XIV) of the code, relating to homesteads..... Took effect by publication March 22, 1898.		2979
99	An act to amend section 3494 (chapter 4, title XVIII) of the code, relating to place of bringing action..... Took effect July 4, 1898.		3494
100	An act to amend sections 3847 and 3849 (chapter 15, title XVIII) of the code, relating to security for costs..... Took effect July 4, 1898.	1 2	3847 3849
101	An act to repeal section 3912 of the code, relating to perishable property, and enact a substitute therefor..... Took effect by publication, March 10, 1898.		1392-a
102	An act to amend section 3947 of the code, relating to notice to defendant in case of garnishment..... Took effect July 4, 1898.		3947
103	An act to amend section 3948 of the code, relating to garnishment..... Took effect by publication, January 29, 1898.		3948
104	An act to amend section 3988 of the code, relating to levy of attachment on mortgaged personal property..... Took effect July 4, 1898.		3988
105	An act to amend section 4142 of the code, relating to shorthand notes..... Took effect July 4, 1898.		4142
106	An act to amend sections 4259 and 2930 of the code, relating to partition of real estate..... Took effect July 4, 1898.	1 2	4259 2930
107	An act to amend section 4538 (chapter 1, title XXII) of the code, relating to the filing of transcripts..... Took effect July 4, 1898.		4538
108	An act to amend section 4606 (chapter 1, title XXIII) of the code, relating to husband and wife as witnesses..... Took effect July 4, 1898.		4606
109	An act relating to the indictment and punishment of persons who have been convicted three or more times, and making certain evidence competent proof upon the trial thereof..... Took effect July 4, 1898.	1-4	4871-a-4871 d
110	An act to amend section 4850 (chapter 5, title XXIV) of the code, relating to taking goods from the charge or custody of an officer..... Took effect July 4, 1898.		4850
111	An act to prohibit illegal voting at primary elections and providing penalties therefor..... Took effect by publication, April 9, 1898.	1-4	4919-a-4919-d
112	An act prohibiting the adulteration of candy and prescribing penalties therefor..... Took effect July 4, 1898.	1 2	4984-a 4984-b

THE TWENTY-SEVENTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
113	An act to repeal section 5016 of the code, relating to dead swine, and enact a substitute therefor..... Took effect July 4, 1898.		5016-a
114	An act to amend sections 5240 and 5246 of the code, relating to the grand jury, and to repeal section 340 of the code..... Took effect by publication, April 13, 1898.	1 2 3	5240 5246 340-a
115	An act to repeal section 5274 of the code, relating to indictments, and enact a substitute therefor.... Took effect July 4, 1898.		5274-a
116	An act to provide for the use of the deputy warden a house, heat and light ..... Took effect by publication, April 13, 1898.		5669-a
117	An act to amend section 5663 of the code, relating to duties of guards at the penitentiary..... Took effect by publication, April 13, 1898.		5663
118	An act to create a state board of control.... Took effect by publication, March 29, 1898.	1 35 36-45 46-55	{ 2727-a1- 2727-a35 2727-a37- 2727-a46 2727-a48- 2727-a57
165	An act to legalize acknowledgments taken under code of '73.. Took effect by publication, April 13. 1898.		2942-c
166	An act to legalize acknowledgments of deeds and conveyances of land..... Took effect July 4, 1898.		2942-d
182	An act to legalize conveyances of real property by executors or trustees under foreign wills..... Took effect July 4, 1898.		3295-a

THE TWENTY-EIGHTH GENERAL ASSEMBLY.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
1	An act to amend chapter 1 of the acts of the twenty-seventh general assembly, relating to the publication of the laws of the state..... Took effect by publication, February 13, 1900.		Page. 3
2	An act to amend paragraph 8 of section 89 of the code, relating to the drawing of warrants by the auditor of state..... Took effect by publication, April 14, 1900.		89
3	An act to amend section 123 of the code, and prohibit the charging off of balances of of unexpended appropriations..... Took effect by publication, April 14, 1900.	1 2	123 123-a
4	An act to amend section 125 of the code, relating to the printing and binding of reports of state officers..... Took effect by publication, April 13, 1900.		125
5	An act to amend section 136 of the code, relating to printing reports of the academy of science..... Took effect by publication, April 6, 1900.		136
6	An act to provide for the making of biennial reports by state officers, commissions, and boards; for the publication thereof by the executive council, and for the repeal of section 163 of the code..... Took effect July 4, 1900.	1-3	163-a-163-c
7	An act to amend section 166 of the code, relating to advertising for sealed proposals..... Took effect by publication, April 7, 1900.		166
8	An act to amend section 227 of the code, relating to Harrison county..... Took effect July 4, 1900.		227
9	An act to repeal sections 256 and 258 of the code, relating to superior courts, and to enact substitutes therefor, and to amend section 276 of the code..... Took effect July 4, 1900.	1 2 3	256-a 258-a 276
10	An act to amend section 261 of the code, relating to superior courts and changes of venue therein..... Took effect by publication, April 7, 1900.		261
11	An act to amend chapter 10 of title III of the code, relating to admission to the bar..... Took effect July 4, 1900.	1 2 3 4 5 6 7 8	310 311 312 315 311-a 311-b 311 c
12	An act to amend section 316 of the code, relating to non-resident attorneys..... Took effect July 4, 1900.		316
13	An act to amend section 370 of the code, relating to administrators, etc., depositing funds with the clerk of the district court..... Took effect July 4, 1900.		370
14	An act to amend section 371 of the code, relating to the duties of the clerk of the district court..... Took effect by publication, February 27, 1900.		371

THE TWENTY-EIGHTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
15	An act to amend section 576 of the code, relative to the duties of township clerk..... Took effect by publication, March 30, 1900.		576
16	An act to amend section 602 of the code, relating to the election of officers in newly incorporated towns; also election of assessor therein..... Took effect July 4, 1900.		602
17	An act to amend section 669 of the code, relating to compensation of councilmen..... Took effect by publication, April 7, 1900.		669
18	An act to amend section 704 of the code, relating to general powers of cities and towns..... Took effect by publication, March 16, 1900.		704
19	An act to amend sections 720, 724 and 725 of the code, relating to powers of cities and towns..... Took effect by publication, February 22, 1900.		{ 720 724 725
20	An act to amend section 729 of the code, relating to the powers of library trustees..... Took effect July 4, 1900.		729
21	An act to amend section 732 of the code, relating to the levying of taxes for library purposes..... Took effect by publication, March 6, 1900.		732
22	An act to amend section 732 of the code as amended, relative to taxes for library purposes..... Took effect by publication, April 12, 1900.	1 2	732 732-a
23	An act to amend section 740 of the code, enabling school corporations to accept gifts and bequests..... Took effect by publication, March 1, 1900.		740
24	An act to amend section 742 of the code, relating to the purchase and construction of waterworks..... Took effect July 4, 1900.	1 2	742 742-a
25	An act to amend sections 747 and 748 of the code, as amended by chapter 23 of the acts of the twenty-seventh general assembly, relating to waterworks..... Took effect by publication, March 6, 1900.	1 2	747-a 748
26	An act to amend section 777 of the code, relating to temporary sidewalks..... Took effect by publication, April 7, 1900.	1 2	777 777-a
27	An act to amend section 779 of the code, relating to the collection of taxes..... Took effect July 4, 1900.		779
28	An act to amend section 799 of the code relating to street improvements and special assessments..... Took effect July 4, 1900.		799
29	An act to regulate the levy and collection of special assessments in cities and towns, and cities acting under special charter.. Took effect by publication, April 14, 1900.	1-5	792-a-792-e
30	An act to amend sections 851 and 852 of the code; also sections 850 and 859 of the code, as amended by chapter 25 of the acts of the twenty-seventh general assembly, relating to park commissioners..... Took effect by publication, February 15, 1900.	1 2 3 4	850 851 852 859
31	An act to amend section 852 of the code and authorizing an increase of the tax levy for park purposes..... Took effect July 4, 1900.		852

THE TWENTY-EIGHTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
32	An act to amend section 894 of the code, relating to taxation in cities and towns. . . . . Took effect by publication, April 4, 1900.		894
33	An act to amend section 1077 of the code, relative to registration of voters. . . . . Took effect by publication, April 12, 1900.		1077
34	An act to amend section 1096 of the code, relating to time of closing polls at election . . . . . Took effect by publication, March 15, 1900.		1096
35	An act amending section 1106 of the code, relating to ballots. . . . . Took effect July 4, 1900.		1106
36	An act to amend section 1119 of the code, relating to the marking and validity of ballots . . . . . Took effect July 4, 1900.		1119
37	An act to provide for greater purity in elections by the use of voting machines; also creating a board of voting machine commissioners and defining their duties, and repealing all laws in conflict with this act. . . . . Took effect July 4, 1900.	1-21	1137-a-1137-u
38	An act to amend section 1173 of the code, relating to election of presidential electors. . . . . Took effect July 4, 1900.		1173
39	An act to amend section 1222 of the code, relating to appeals in certain cases . . . . . Took effect by publication, February 27, 1900.		1222
40	An act to encourage the manufacture of sugar in the state of Iowa, by making certain exemptions in taxes . . . . . Took effect by publication, April 11, 1900.		1304-a
41	An act to repeal section 1306 of the code, relating to assessment of taxes, and indebtedness of counties and other political and municipal corporations . . . . . Took effect by publication, April 7, 1900.	1 2	1306-a 1306-b
42	An act to provide for the taxation of the property of telegraph and telephone companies, and to amend section 1330 of the code, and to repeal section 1331 of the code . . . . . Took effect by publication, April 13, 1900.	1 2-8 9	1330 1330-a-1330-g 1331-a
43	An act to amend section 1333 of the code, and enacting certain provisions relative to taxing insurance corporations. . . . . Took effect by publication, March 31, 1900.	1-6	1333-1333-e
44	An act to amend section 1340 of the code, relating to assessment of taxes. . . . . Took effect July 4, 1900.		1340
45	An act providing for the taxation of the property of express companies, and repealing sections 1345 and 1346 of the code, and chapter 31 of the acts of the twenty-seventh general assembly . . . . . Took effect by publication, April 14, 1900.	1 4 5 8-10	1346-a 1346-d 1346-e 1346-h-1346-j
46	An act to amend section 1348 of the code, relating to licensing peddlers. . . . . Took effect July 4, 1900.		1348
47	An act to repeal section 1385 of the code, relating to correction of assessment and tax lists, and enact a substitute therefor. . . . . Took effect July 4, 1900.	1 3	1385-a-1385-c

## THE TWENTY-EIGHTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
48	An act to repeal section 1389 of the code, relating to record of delinquent taxes, and to enact a substitute therefor..... Took effect July 4, 1900.	1-4	1389-a-1389-d
49	An act to authorize the executive council to reassess and relevy taxes heretofore or hereafter held to be invalid, to certify the same to the proper county officers, and to authorize such officers to levy such taxes ..... Took effect by publication, April 7, 1900.	1 2	1330-h 1330-i
50	An act providing for the discovery of property withheld from taxation, and listing the same..... Took effect by publication, April 12, 1900.	1-5	1407-a-1407-e
51	An act to amend chapter 4 of title VII of the code, and chapter 37 of the acts of the twenty-seventh general assembly, relating to assessment and collection of collateral inheritance tax..... Took effect by publication, April 10, 1900.	1 2 3 4 5 6 7 8 9 10 11 12	1467-a 1467-b 1467-d 1467-e 1476-a 1479-b 1471-a 1478-b 1478-a 1478-c 1477-e 1467-c
52	An act to amend section 1560 of the code, relating to notice to remove obstruction from highways..... Took effect July 4, 1900.		1560
53	An act to amend section 1563 of the code, relating to the Russian thistle..... Took effect July 4, 1900.		1563
54	An act to amend section 1570 of the code, relating to trimming of hedges..... Took effect July 4, 1900.		1570
55	An act to amend section 1571 of the code, relating to operation of steam threshing engines on public highways..... Took effect July 4, 1900.		1571
56	An act to amend section 1618 of the code, relating to renewal of corporations, and fee to be paid..... Took effect by publication, March 16, 1900.	1 2	1618 1618-a
57	An act to amend section 1627 of the code, relating to shares of capital stock of corporations ..... Took effect July 4, 1900.		1627
58	An act to create a department of agriculture, and to repeal sections 1653, 1654, 1655, 1656, 1657, 1674, 1682, and 1683 of the code, and chapter 42 of the acts of the twenty-seventh general assembly and amending sections 1679 and 1681 of the code..... Took effect July 4, 1900.	1-17 18 19 20 21	1657-b-1657-r 1657-a 1679-1681 1657-s 1657-t
59	An act to amend chapter 43 of the acts of the twenty-seventh general assembly, relating to agricultural societies, and to amend sections 1658 and 1659 of the code..... Took effect July 4, 1900.	1 2	1661-a 1658-1659
60	An act to amend section 1709 of the code, relating to insurance Took effect by publication, April 3, 1900.		1709
61	An act to amend section 1710 of the code, relating to limitation of insurance risks ..... Took effect July 4, 1900.		1710

THE TWENTY-EIGHTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
62	An act to repeal section 1720 of the code, relating to auditor's insurance report, and to enact a substitute therefor..... Took effect by publication, March 15, 1900.		1720-a
63	An act to amend section 1743 of the code, relating to stipulations of arbitration in policies..... Took effect July 4, 1900.		1743
64	An act to amend section 1743 (chapter 4, title IX) of the code, relating to insurance other than life.... Took effect July 4, 1900.		1743
65	An act relating to insurance companies on the stipulated premium plan, and to amend chapter 7, title IX of the code, and provide penalty for violations . . . . Took effect by publication, April 12, 1900.	1-16	1784-1784-o
66	An act to amend section 1806 of the code, relating to loans on life insurance policies..... Took effect July 4, 1900.		1806
67	An act to add to chapter 10 of title IX and to amend sections 1848 and 1852 of the code, relating to savings banks . . . . Took effect by publication, April 5, 1900.	1 2, 4 3	1850-a 1848 1852
68	An act to amend section 1889 of the code, relating to receiving of time deposits by loan and trust companies..... Took effect July 4, 1900.		1889
69	An act to amend chapter 13, title IX of the code, and to repeal chapter 48 of the acts of the twenty-seventh general assembly, relating to building and loan associations..... Took effect by publication, May 3 1900.	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16	1898-c 1902-a 1903-a 1899-a 1903-b 1898-d 1907-a 1907-b 1907-c 1893-a 1894 a 1898-a 1906 a 1908-a 1915-a 1898-b
70	An act to amend section 1998 of the code, relating to condemnation of additional ground for railroad purposes..... Took effect by publication, April 5, 1900.		1998
71	An act to regulate the sale, and require the redemption, of passenger tickets by common carriers..... Took effect July 4, 1900.	1-4	2128-a-2128-d
72	An act to amend the military code of Iowa. Sections 2173, 2178, 2180, 2203, 2212, amended; and sections 2176, 2179, 2181 and 2211, repealed and substitutes enacted therefor... Took effect July 4, 1900.	1 2 3 4 5 6 7 8 9	Repealed. 2176-a Repealed. 2180 2181-a 2203 2211-a 2212 2178
73	An act to amend section 2213 of the code, relating to compensation of officers and soldiers of the Iowa national guard.... Took effect by publication, April 6, 1900.	1 2	2213 2213 a

THE TWENTY-EIGHTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
74	An act to amend section 2382 of the code, relating to the sale of intoxicating liquor..... Took effect July 4, 1900.	1, 2	2382
75	An act to amend sections 2390 and 2393 of the code, relating to bonds of pharmacists..... Took effect July 4, 1900.	1 2	2390 2393
76	An act to amend section 2401 of the code, relating to businesses conducted under permits..... Took effect July 4, 1900.		2401
77	An act to amend section 2403 of the code, relating to sale of intoxicating liquors..... Took effect by publication, April 12, 1900.		2403
78	An act to amend section 2451 of the code, relating to revocation of a bar to proceedings against persons selling intoxicating liquors..... Took effect July 4, 1900.		2451
79	An act to amend section 2483 of the code, relating to compensation of mine inspectors..... Took effect July 4, 1900.		2483
80	An act to amend section 2490 of the code relating to mines and mining..... Took effect July 4, 1900.		2490
81	An act to amend section 2490 of the code, relating to payment of coal miners..... Took effect July 4, 1900.		2490
82	An act requiring mine foremen, etc., to submit to examination, and hold certificates of competency, and providing penalties for violations of this act..... Took effect July 4, 1900.	1-6	2489-a-2489-f
83	An act to amend section 2508 of the code, relating to inspection and use of petroleum products..... Took effect by publication, April 13, 1900.	1 2	2508 2508-a
84	An act to amend sections 2512, 2513 and 2514 of the code, relating to inspection of passenger boats..... Took effect by publication, March 30, 1900.	1 2 3	2512 2513 2514
85	An act to amend section 2515 of the code, relating to assistant dairy commissioner..... Took effect July 4, 1900.		2515
86	An act to protect game and provide a fund to pay expenses of prosecution under this act..... Took effect by publication, March 23, 1900.	1-5 7 8	2563-a-2563-e 2563-g 2563-h
87	An act to repeal section 6 of chapter 86 of the acts of the twenty-eighth general assembly, and to enact a substitute therefor..... Took effect by publication, April 12, 1900.		2563-f
88	An act to amend section 2564 of the code, relating to public health districts..... Took effect July 4, 1900.		2564
89	An act to amend sections 2576 and 2582 of the code, relating to examination of persons entering the practice of medicine... Took effect by publication, February 27, 1900.	1 2	2576 2582
90	An act to amend section 2583 (chapter 17, title XII) of the code, relating to compensation of secretary of state board of medical examiners..... Took effect July 4, 1900.		2583

THE TWENTY-EIGHTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
91	An act to repeal chapter 19 of title XII of the code, and enact a substitute therefor, relating to dentistry..... Took effect July 4, 1900.	1-12	2600-a-2600-l
92	An act to define powers of the board of control in relation to the pension money of members of the Iowa Soldiers' Home. Took effect by publication, March 31, 1900.	1 2 4	2606-a 2606-b 2606-d
93	An act to regulate the practice of veterinary medicine, etc., in the state of Iowa, and provide penalties ..... Took effect July 4, 1900.	1 3-16	2538-a 2538-c-2538-p
94	An act to amend sections 2622 and 2627 of the code, relating to duties of superintendent of public instruction ..... Took effect July 4, 1900.	1 2	2622 2627
95	An act to amend section 2629 of the code, relating to examination of teachers for state certificates ..... Took effect July 4, 1900.		2629
96	An act to repeal section 2630 of the code, relating to teachers' certificates, and to enact a substitute therefor ..... Took effect July 4, 1900.	1 2	2630-a 2630-b
97	An act providing for the levy of a special tax for the state university ..... Took effect July 4, 1900.		Repealed.
98	An act to amend section 2667 of the code, relating to interest on loans from funds of the state college of agriculture and the mechanic arts ..... Took effect by publication, January 25, 1900.		2667
99	An act to levy a tax to provide for equipment of necessary buildings for the Iowa state college of agriculture and mechanic arts..... Took effect July 4, 1900.		Repealed.
100	An act repealing sections 2702, 2703 and 2705 of the code, and chapter 80 of the twenty-seventh general assembly, and amending chapter 8 of title XIII of the code, relating to industrial schools..... Took effect July 4, 1900.	1 2 3 4 5 6 7 8 9 10 11 12 13 14	2703-a 2704 2705-a 2705-b 2707 2708 2709 2710 2711 2713 2709, 2711 2711-a 2711
101	An act making provision for the support of the industrial school for girls, at Mitchellville, Iowa..... Took effect by publication, April 6, 1900.		2713
102	An act relating to the industrial school for girls and to establish a reformatory for females at Anamosa ..... Took effect by publication, April 11, 1900.	1-14	2713 a-2713-n
103	An act providing for closing the industrial home for the blind. Took effect by publication, April 7, 1900.	1-8	2722-a-2722-h
104	An act to amend section 2750 of the code, relating to special meetings of voters of school corporations..... Took effect by publication, April 5, 1900.		2750
105	An act to amend section 2755 of the code, relating to election precincts of school districts ..... Took effect by publication, February 10, 1900.		2755

## THE TWENTY-EIGHTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS	SECTIONS OF THIS WORK.
106	An act to amend section 2771 of the code, relating to filling vacancies on boards of school directors ..... Took effect July 4, 1900.		2771
107	An act to amend section 2778 of the code, relating to employment of teachers. .... Took effect July 4, 1900.		2778
108	An act to amend section 2806 of the code, relating to the contingent fund. .... Took effect July 4, 1900.		2806
109	An act to provide for the teaching of the elements of vocal music in all the public schools of Iowa. .... Took effect July 4, 1900.	1 2	2823-s 2823-t
110	An act to establish libraries in all school districts ..... Took effect July 4, 1900.	1-5	2823-n-2823 r
111	An act to amend section 2831 of the code, relating to county uniformity of school books. .... Took effect July 4, 1900.		2831
112	An act to amend section 2832 of the code, relative to distribution of uniform text-books. .... Took effect July 4, 1900.		2832
113	An act to amend sections 2849 and 2855 of the code, relating to the school fund, loans and interest. .... Took effect by publication, March 6, 1900.	1 2	2849 2855
114	An act consolidating a portion of the state library with the historical department. .... Took effect by publication, March 13, 1900.	1-6	2881-a-2881-f
115	An act to amend section 2881 of the code, relating to the compensation of state librarian and assistants ..... Took effect by publication, April 7, 1900.		2881
116	An act to create a library commission and promote free public libraries in the state of Iowa. .... Took effect July 4, 1900.	1	2888-a
117	An act relating to the rights of alien corporations. .... Took effect by publication, March 16, 1900.	1-3	2889-a-2889-c
118	An act relating to notarial seals of non-resident notaries. .... Took effect July 4, 1900.		2943-a
119	An act to amend section 2978 of the code, relating to extent of a homestead, within city or town. .... Took effect July 4, 1900.		2978
120	An act to amend section 3138 of the code, relating to hotel and innkeepers' liabilities. .... Took effect by publication, April 6, 1900.		3138
121	An act defining the place of bringing action against corporations engaged in coal mining. .... Took effect July 4, 1900.		3499-a
122	An act to amend section 3958 of the code, relating to return of executions. .... Took effect July 4, 1900.		3958
123	An act to amend section 4027 of the code, relating to notice of execution sales. .... Took effect July 4, 1900.		4027
124	An act to amend section 4051 of the code relating to redemption of real estate sold upon execution. .... Took effect July 4, 1900.		4051

THE TWENTY-EIGHTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
125	An act to amend section 4608 of the code, relating to communications in professional confidence..... Took effect by publication, February 10, 1900.		4608
126	An act to amend section 4807 of the code, relating to malicious mischief and trespass..... Took effect July 4, 1900.		4807
127	An act to punish railway train robbers..... Took effect by publication, March 30, 1900.		4810-a
128	An act providing for the payment by the state of costs and fees incurred in prosecutions for escaping from the penitentiary.. Took effect July 4, 1900.	1-3	4897-b-4897 d
129	An act to repeal section 4946 of the code, relating to bodies for medical purposes, and to enact a substitute therefor..... Took effect July 4, 1900.	1-5	4946-a-4946-e
130	An act prohibiting the use of gasoline, benzine, naphtha, and other explosives in tenements..... Took effect by publication, April 5, 1900.	1 2	4999-k 4999-l
131	An act to prevent and punish the desecration of the flag of the United States..... Took effect July 4, 1900.		5028 a
132	An act to amend section 5034 of the code, relating to using blasphemous or obscene language..... Took effect July 4, 1900.		5034
133	An act to punish persons engaged in boxing contests where admission is charged, and accessor es..... Took effect July 4, 1900.		5038-a
134	An act to amend section 5258 of the code, relating to minutes kept by grand jury..... Took effect by publication, April 3, 1900.		5258
135	An act to amend section 5373 of the code, relating to evidence on part of state in criminal causes..... Took effect July 4, 1900.		5373
136	An act to amend sections 5662 and 5667 of the code, relating to bonds of wardens and clerks of penitentiaries..... Took effect by publication, April 5, 1902.	1 2	5662 5667
137	An act to amend section 5685 of the code, relating to gate receipts at penitentiaries..... Took effect by publication, April 13, 1900.	1 2	5685 5685-a
138	An act to prohibit the manufacture of pearl buttons and butter tubs in the state penitentiary..... Took effect by publication, April 13, 1900.	1 2	5702-a 5702-b
139	An act to repeal chapter 38 of the acts of the twenty-seventh general assembly, relating to cutting of weeds on public roads, and enact a substitute therefor..... Took effect July 4, 1900.		1562-a
140	An act authorizing the board of control to use unexpended balance of appropriation made in chapter 140 of the acts of the twenty sixth general assembly, and to amend chapter 54 of the acts of the twenty-seventh general assembly, relating to patients in insane hospitals..... Took effect July 4, 1900.		2291-a

## THE TWENTY-EIGHTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
141	An act to amend section 1 of chapter 74 of the acts of the twenty-seventh general assembly, relating to the salary of the chief executive officer of the Iowa soldiers' orphans' home at Davenport..... Took effect by publication, April 5, 1900.		2727-c
142	An act to amend section 1 of chapter 95 of the acts of the twenty-seventh general assembly in relation to bonds of school corporations..... Took effect by publication, April 10, 1900.		Repealed.
143	An act to amend chapter 118 of the acts of the twenty-seventh general assembly, relating to certain state institutions..... Took effect by publication, April 13, 1900.	1 2 3 4 5	2727-a47 2727-a35 2727-a36 2727 a3 2727-a43
144	An act placing private and county institutions for care of the insane under the board of control..... Took effect by publication, April 13, 1900.	1-11	{ 2727-a58- 2727-a68
145	An act to amend chapter 148 of the acts of the twenty-seventh general assembly, relating to traveling libraries..... Took effect July 4, 1900.		Omitted.
146	An act repealing section 9 of chapter 160 of the acts of the ninth general assembly, and providing for the payment, by the treasurer of state of swamp land indemnity to county authorities..... Took effect by publication, April 12, 1900.	1-3	116-d-116 f
147	An act to amend chapter 61 of the private, local, and temporary acts of the fifteenth general assembly, confirming in the state university of Iowa, the title to certain town lots and streets..... Took effect July 4, 1900.		Omitted.
182	An act to surrender jurisdiction to the United States over certain real property..... Took effect July 4, 1900.		4-a

THE TWENTY-NINTH GENERAL ASSEMBLY.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
1	An act to amend section 65 of the code, relating to the salary of the governor. . . . . Operative January, 1904.		65
2	An act to amend section 106 of the code, relating to time of settlement of auditor of state with treasurer of state. . . . . Took effect July 4, 1902.		106
3	An act relating to the defense of the treasurer of state in certain cases, and providing for payment and satisfaction of judgments rendered against him in such cases. . . . . Took effect by publication, April 3, 1902.	1-5	116-g-116-k
4	An act to amend sections 118 and 119 of the code, defining the duties of the state printer and state binder. . . . . Took effect July 4, 1902.	1 2	118 119
5	An act to amend section 120 of the code, relating to printing and binding. . . . . Took effect July 4, 1902.		120
6	An act to amend sections 125 and 126 of the code, relating to printing, etc., of public documents. . . . . Took effect July 4, 1902.	1 2	125 126
7	An act to amend section 136 of the code, relating to publication of reports of Iowa academy of sciences. . . . . Took effect by publication, March 27, 1902.		136
8	An act providing for the purchase of engravings, plates, or cuts for state publications, and fixing the manner of paying the cost of same. . . . . Took effect July 4, 1902.		137-a
9	An act repealing section 161 of the code, relating to annual settlements with state departments, and enacting a substitute therefor. . . . . Took effect by publication, April 9, 1902.		161-a
10	An act to amend sections 164 and 165 of the code, relating to powers and duties of the executive council. . . . . Took effect July 4, 1902.	1 2	164 165
11	An act to amend section 165 of the code, relating to sale of state furniture and stores. . . . . Took effect July 4, 1902.		165
12	An act to amend chapter 1, title III of the code, relating to the organization of the supreme court. . . . . Took effect July 4, 1902.	1 2 3 4 5-8	192-a 192-b 193-a 193-b 203-a-203-d
13	An act to amend section 253 of the code, relating to the salaries of district judges. . . . . Took effect July 4, 1902.		253
14	An act to repeal section 254 of the code, relating to compensation of shorthand reporters, and to enact a substitute therefor. . . . . Took effect July 4, 1902.	1-3	254-a-254-c
15	An act authorizing the district court to appoint trustees to manage, control and invest funds donated for and on account of cemetery purposes. . . . . Took effect July 4, 1902.	1-8	254-d-254-k

## THE TWENTY-NINTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
16	An act to amend section 255 of the code relating to superior courts . . . . . Took effect July 4, 1902.		255
17	An act to amend section 296 of the code, relating to fees in probate matters. . . . . Took effect July 4, 1902.		296
18	An act to amend section 308 and to repeal section 303 of the code, relating to compensation of county attorneys, and to enact a substitute therefor. . . . . Took effect July 4, 1902.	1 2	303-a 308
19	An act to amend section 325 of the code, relating to removal of attorneys, and payment of costs therefor. . . . . Took effect by publication, April 11, 1902.		325
20	An act to amend section 337 of the code relating to grand and petit jury lists. . . . . Took effect July 4, 1902.		337
21	An act to amend section 423 of the code, relating to the powers of boards of supervisors. . . . . Took effect by publication, March 27, 1902.		423
22	An act to amend section 441 of the code, relating to compensation of official papers. . . . . Took effect July 4, 1902.		441
23	An act requiring the county auditor to compile and prepare a financial report and providing for the printing and distribution thereof. . . . . Took effect July 4, 1902.	1 2	480-a 480-b
24	An act to amend section 483 of the code, relating to payment of interest on county warrants . . . . . Took effect July 4, 1902.		483
25	An act to amend section 496 of the code, relating to employment of additional help by county recorders . . . . . Took effect July 4, 1902.		496
26	An act to amend section 508 of the code, relating to sheriffs' fees. . . . . Took effect July 4, 1902.		508
27	An act to repeal sections 509 and 510 of the code, relating to compensation of sheriffs and deputy sheriffs and to fix the salaries of such officers. . . . . Took effect July 4, 1902.	1 2	510-a 510 b
28	An act to amend section 586, of the code, relating to care and maintenance of cemeteries. . . . . Took effect July 4, 1902.		586
29	An act to amend sections 645 and 658 of the code, relating to powers and duties of mayors of cities. . . . . Took effect by publication, April 3, 1902.	1 2	658 645
30	An act to amend sections 661 and 674 of the code, relating to assessors in cities and towns. . . . . Took effect July 4, 1902.	1 2	661 674
31	An act creating a board of police and fire commissioners in cities of the first class having more than sixty thousand inhabitants, and defining powers and duties of such. . . . . Took effect July 4, 1902.	1-10	679-a-679-j
32	An act amending section 721 of the code, relating to questions submitted to popular vote in cities or towns. . . . . Took effect July 4, 1902.		721

THE TWENTY-NINTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
33	An act to amend section 724 of the code, as amended by chapter 19 of the acts of the twenty-eighth general assembly, relating to powers of cities and towns . . . . . Took effect by publication, April 5, 1902.		724
34	An act to amend section 727 of the code, relating to gifts and bequests for library purposes . . . . . Took effect by publication, April 8, 1902.	1 2	727 727-a
35	An act to authorize library boards to condemn grounds for location of libraries and for additional library grounds . . . . . Took effect July 4, 1902.	1-3	729-a-729-c
36	An act to amend section 732 of the code, as amended by chapters 21 and 22 of the acts of the twenty-eighth general assembly, relating to levying of taxes for library purposes . . . . . Took effect July 4, 1902.		732
37	An act requiring the keeping of accounts in cities and towns and requiring that publicity be given thereto . . . . . Took effect July 4, 1902.	1-3	741-a-741-c
38	An act authorizing the loaning of funds accumulated under chapter 1 of the acts of the twenty-sixth general assembly, or under section 742 of the code, and to legalize a contract between the city of Des Moines and the Des Moines Water Works company for a loan of such funds . . . . . Took effect by publication, February 18, 1902.	1 3	742-b 742 c
39	An act to amend chapter 5, sections 745, 746, 747 and 748 of the code, relating to purchase or erection of water works in cities of the first class . . . . . Took effect July 4, 1902.	1	{ 745, 746 747a, 748
40	An act to amend section 745 of the code, as amended by chapter 23 of the acts of the twenty-seventh general assembly, relating to purchase and construction of water works . . . . . Took effect by publication, March 28, 1902.	1 2	745 745-a
41	An act to repeal section 747 of the code as amended relating to appointment of water works trustees, in cities of the first class, and to enact a substitute therefor . . . . . Took effect by publication, March 15, 1902.	1 2	747-a 747-b
42	An act authorizing cities having voted taxes aiding corporations in constructing bridges across a navigable boundary river, to vote additional taxes for the purchase of such bridge . . . . . Took effect July 4, 1902.	1-4	766-a-766 d
43	An act to amend sections 771, 773 and 774 of the code, relating to viaducts . . . . . Took effect July 4, 1902.	1 2 3	771 773 774
44	An act to amend section 823 of the code, relating to notice of the levy of special assessments . . . . . Took effect by publication, April 4, 1902.		823
45	An act to amend sections 850 and 859 of the code, as amended by chapter 25 of the acts of the twenty-seventh general assembly, and as amended by chapter 30 of the acts of the twenty-eighth general assembly, relating to park commissioners in cities . . . . . Took effect July 4, 1902.	1,2 3	850 859
46	An act to amend sections 860, 861 and 862 of the code, relating to powers of certain cities to vote taxes for parks and dams, and jurisdiction of same over parks without their corporate limits . . . . . Took effect by publication, April 5, 1902.	1 2 3	860 861 862

## THE TWENTY-NINTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
47	An act relating to the power of certain cities and towns to appropriate money for park purposes..... Took effect July 4, 1902.	1 2	862-a 862-b
48	An act to amend section 894 of the code, as amended by chapter 32 of the acts of the twenty-eighth general assembly, relating to levy of special taxes by cities..... Took effect by publication, April 3, 1902.		894
49	An act to amend section 915 of the code, relating to recording and certification of plats..... Took effect July 4, 1902.		915
50	An act repealing section 953 of the code, and section 2 of chapter 28 of the acts of the twenty-seventh general assembly, and amending subdivision 6 of section 1005 of the code, relating to assessment of taxes for library purposes in cities acting under special charters..... Took effect July 4, 1902.	1 2	953-a 1005
51	An act to fix the compensation of waterworks trustees in special charter cities..... Took effect by publication, April 16, 1902.		955-a
52	An act to amend section 1004 of the code, relating to levying taxes in special charter cities..... Took effect by publication, April 8, 1902.		1004
53	An act to amend sections 1075, 1130, 1528, 1533, 1542, 1545, 1551, and 1554, and 4803 of the code, and to repeal sections 1532, 1540 and 1550 of the code, and to enact substitutes therefor, and to repeal sections 1541, 1546, 1553 and 1567 of the code, relating to duties of township trustees, clerks, etc..... Took effect July 4, 1902.	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18	1075 1130 1528 1532-a 1533 1540-a 1541-a Repealed. 1545 1546-a 1551 1553-a 1554 1567-a 1566-a 4808 1566-b 1567-b
54	An act providing for condition of bond to be given by public officers and others..... Took effect by publication, April 11, 1902.	1-4	1177-a-1177-d
55	An act to fix the compensation of appraisers of property... .. Took effect by publication, April 5, 1902.		1290-a
56	An act to amend section 1304 of the code, relating to exemption of property from taxation..... Took effect July 4, 1902.		1304
57	An act to amend section 1333 of the code, relating to taxes on foreign insurance companies..... Took effect July 4, 1902.		1333
58	An act to amend sections 1334 and 1337 of the code, relating to assessment of railway property for taxation..... Took effect by publication, March 1, 1902.	1 2	1334 1337
59	An act to amend section 1400 of the code, relating to taxes levied on buildings..... Took effect July 4, 1902.		1400

THE TWENTY-NINTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
60	An act requiring railroad companies to file plats of all lines of railroad owned or operated in the several counties of the state with county auditors..... Took effect July 4, 1902.	1 2	1337-a 1337-b
61	An act relating to reports to be made by railroads to the executive council..... Took effect by publication, April 15, 1902.	1-6	1340 a-1340-f
62	An act defining and providing for the taxation of freight line and equipment companies..... Took effect July 4, 1902.	1-8	1342-a-1342-g
63	An act to re'und to administrators any surplus they have paid to the treasurer of state as collateral inheritance tax in excess of that legally due..... Took effect July 4, 1902.	1 2	1475-a 1475-b
64	An act to amend sections 1528, 1533, 1554 of the code and to repeal section 1542 and to enact a substitute therefor, relating to the levying, certifying and collection of road tax..... Took effect by publication, March 27, 1902.	1 2 3 4	1528 1533 1542-a 1554
65	An act to amend section 1530 of the code, relating to the working of highways..... Took effect July 4, 1902.		1530
66	An act to amend sections 1610 and 1618 of the code, as amended by chapter 40 of the acts of the twenty-seventh general assembly, and chapter 56 of the acts of the twenty-eighth general assembly, relating to incorporations for pecuniary profit..... Took effect by publication, March 5, 1902.	1 2	1610 1618
67	An act to amend section 1613 of the code, relating to publication of notice of incorporation..... Took effect by publication, March 18, 1902.		1613
68	An act to amend sections 1672 and 1673 of the code relating to the horticultural society..... Took effect July 4, 1902.	1 2	1672 1673
69	An act to amend section 1675 of the code, relating to farmers' county institutes..... Took effect July 4, 1902.		1675
70	An act amending paragraph 5 of section 1709 of the code, relating to insurance..... Took effect July 4, 1902.		1709
71	An act to amend section 1709 of the code, relating to insurance Took effect July 4, 1902.		1709
72	An act to amend section 1710 of the code, relating to limitation of insurance risks..... Took effect July 4, 1902.		1710
73	An act relating to notice and proof of loss, of personal property insured..... Took effect by publication, April 12, 1902.		1742-a
74	An act to amend section 1759 of the code, and to provide for the insurance of plate glass..... Took effect July 4, 1902.		1759
75	An act to amend section 1771 of the code, relating to stock or premium notes..... Took effect July 4, 1902.		1771

## THE TWENTY-NINTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
76	An act to amend section 1870 of the code, relating to limit of liabilities of banks ..... Took effect by publication, April 11, 1902.		1870
77	An act amending chapter 13 of the code, and chapter 69 of the acts of the twenty-eighth general assembly, relating to building and loan associations ..... Took effect July 4, 1902.	1-10	1920-a-1920-j
78	An act to amend sections 1946, 1948 and 1951 of the code, relating to levees, drains and water courses..... Took effect July 4, 1902.	1 2 3	1946 1948 1951
79	An act to amend section 1998 of the code, relating to depot grounds of railway corporations..... Took effect by publication, April 11, 1902.		1998
80	An act amendatory of chapter 4, title X of the code, enabling the United States to take private property for public improvements ..... Took effect by publication, April 4, 1902.		2024-c
81	An act amending section 2026 of the code, relating to interurban street railways..... Took effect July 4, 1902.	1-4 5 6	2033-a-2033-d 2026 2033-e
82	An act to amend section 2028 of the code, relating to taking of private property for works of internal improvement..... Took effect by publication, April 2, 1902.		2028
83	An act providing for the condemnation of real estate by the state, for the use and benefit of institutions of the United States, and the payment of damages thereof..... Took effect by publication, April 5, 1902.	1 2	2024-a 2024-b
84	An act to authorize and empower railroad corporations of this state to transact business, lease or purchase railroads, or to purchase the stock, bonds or securities of railroads in other states..... Took effect by publication, April 18, 1902.	1 2	2038-a 2038-b
85	An act to amend sections 2084, 2085, 2086, 2087, 2088, 2089, 2090 and 2091 of the code, relating to taxes in aid of railroads, and extending the provisions thereof to trolley and electric railways ..... Took effect by publication, March 12, 1902.	1 2	2084 2091-a
86	An act to amend section 2086 of the code, relating to the voting of taxes in aid of railways..... Took effect by publication, April 9, 1902.		2086
87	An act requiring railway companies to post in passenger stations bulletins giving the time of arrival and departure of trains..... Took effect July 4, 1902.		2077-a
88	An act to repeal sections 2168, 2169, 2173, of the code and 2179 of the code as amended by chapter 72 of the acts of the twenty-eighth general assembly, and to enact substitutes therefor, and to amend sections 2174, 2175 and 2181 of the code, as amended by chapter 72 of the acts of the twenty-eighth general assembly, and 2199 of the code, relating to the militia..... Took effect by publication, April 16, 1902.	1 2 3 4 5 6 7 8	2168-a 2169-a 2173-a 2174 2175 2179-a 2181 2199
89	An act to amend sections 2204 and 2214 of the code, relating to the militia..... Took effect by publication, April 12, 1902.	1 2	2204 2214

THE TWENTY-NINTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
90	An act authorizing the commander-in-chief to organize naval militia in Iowa, and prescribing regulations..... Took effect July 4, 1902.	1-5	2215-a-2215-e
91	An act to repeal section 2253 of the code, relating to hospitals for the insane, and to enact a substitute therefor..... Took effect July 4, 1902.		2253-a
92	An act to amend section 2267 of the code, relating to appeals from findings of commissioners of insanity..... Took effect July 4, 1902.		2267
93	An act to provide a department in one of the hospitals for the insane for the treatment of dipsomaniacs, inebriates and those addicted to the excessive use of narcotics..... Took effect July 4, 1902.	1-5	2310-a-2310-e
94	An act to amend section 2410 of the code, relating to sale of intoxicating liquors and abatement of nuisance..... Took effect July 4, 1902.		2410
95	An act to amend sections 2433 and 2435 of the code, relating to sale of intoxicating liquors, and assessment of mulct tax.... Took effect by publication, April 8, 1902.	1 2	2433 2435
96	An act to amend subdivision 3 of section 2448 of the code, relating to surety on bonds..... Took effect July 4, 1902.		2448
97	An act amending sections 2470, 2471 and 2472 of the code relating to commissioner of labor statistics..... Took effect July 4, 1902.	1 2 3	2470 2471 2472
98	An act to amend chapter 9, title XII of the code, relating to mines and mining..... Took effect July 4, 1902.		2479-a
99	An act to amend section 2482 of the code, relating to mines and mining..... Took effect July 4, 1902.		2482
100	An act relating to the examination of shot examiners in coal mines and defining their duties..... Took effect by publication, April 16, 1902.		2495-b
101	An act to amend section 2508 of the code, relating to the inspection and use of petroleum products..... Took effect July 4, 1902.		2508
102	An act amending section 2522 of the code, relating to reports to dairy commissioner..... Took effect July 4, 1902.		2522
103	An act to amend sections 2540, 2551, 2556 and 5561 of the code, and section 2539 of the code as amended by chapter 64 of the acts of the twenty-seventh general assembly; and to repeal section 5 of chapter 64 of the acts of the twenty-seventh general assembly, and making further provisions, relating to care of fish and protection of birds and game..... Took effect July 4, 1902.	1 2 3 4 5 6 7 8 9	2539 2540 2539-a 2540 2540-a 2546 2551 2556 2561
104	An act to amend section 2547 of the code, and prohibit the taking of fish from certain waters, except with hook and line..... Took effect by publication, March 26, 1902.		2547

## THE TWENTY-NINTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS	SECTIONS OF THIS WORK.
105	An act to repeal section 2570 of the code, relating to quarantine and the expenses thereof, and to enact a substitute therefor..... Took effect by publication, April 16, 1902.	1 2	2570-a 2570-b
106	An act to amend section 2571 of the code, relating to time of meetings for local board of health..... Took effect July 4, 1902.		2571
107	An act to amend section 2572 of the code, relating to enforcement of rules of state board of health..... Took effect by publication, March 18, 1902.		2572
108	An act relating to powers of boards of health and the erection and maintenance of pest houses and hospitals in certain cases Took effect July 4, 1902.	1 2	2575-a 2575-b
109	An act to amend section 2581 of the code, relating to itinerant physicians..... Took effect July 4, 1902.		2581
110	An act relating to the sale of cocaine and providing punishment for the illegal sale thereof..... Took effect by publication, March 25, 1902.	1-3	2596-a-2596-c
111	An act to amend section 2604 of the code, relating to appointment of officers for the soldiers' home..... Took effect July 4, 1902.		2604
112	An act to amend section 2604 of the code, relating to compensation of adjutant, quartermaster and surgeon of the Iowa soldiers' home..... Took effect July 4, 1902.		2604
113	An act to amend section 2608 of the code, as amended by chapter 72 of the acts of the twenty-seventh general assembly, and to provide additional support for the soldiers' home at Marshalltown..... Took effect by publication, April 17, 1902.		2608
114	An act to amend section 2629 of the code, relating to examination of applicants for state certificates..... Took effect by publication, April 10, 1902.		2629
115	An act providing for the inspection, recognition and supervision of schools for the instruction and training of teachers for the common schools, and for the licensing of graduates of the same..... Took effect July 4, 1902.	1-4	2634-b 2634-e
116	An act establishing the rank of commandant and instructor in military science and tactics in state educational institutions. Took effect by publication, March 25, 1902.		2644-c
117	An act providing for a special tax for the state normal school at Cedar Falls, Iowa..... Took effect by publication, April 10, 1902.		2682-a
118	An act providing for the admission of feeble-minded women to the institution at Glenwood, and for the maintenance thereof Took effect July 4, 1902.	1 2	2695-a 2695-b
119	An act to amend sections 2708, 2709, 2711 (chapter 8, title XIII) of the code, and to repeal sections 12, 13 and 14 of chapter 100 of the acts of the twenty-eight general assembly, relating to the discharge of boys and girls from industrial schools.... Took effect by publication, March 25, 1902.	1 2 3 4	{ 2708, 2708-a, 2709, 2711 2708 2709 2711
120	An act to amend 2711 of the code, relating to discharge or parole of inmates of industrial schools..... Took effect July 4, 1902.		2711

THE TWENTY-NINTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.					
121	An act to repeal section 2718 of the code, as amended by chapter 82 of the acts of the twenty-seventh general assembly, relating to support of the college for the blind, and to enact a substitute therefor..... Took effect by publication, March 19, 1902.	1 2	2718-a 2718 b					
122	An act to repeal section 2727 of the code, as amended by chapter 83 of the acts of the twenty-seventh general assembly, relating to support of the school for the deaf, and to enact a substitute therefor..... Took effect by publication, March 20, 1902.	1 2	2727-a 2727-b					
123	An act to amend section 2738 of the code, relating to duties of county superintendents..... Took effect July 4, 1902.		2738					
124	An act to amend section 2742 of the code, relating to county superintendents..... Took effect July 4, 1902.		2742					
125	An act to amend section 2755 of the code, relating to registration of voters for school elections..... Took effect July 4, 1902.		2755					
126	An act to amend section 2794 of the code, relating to the organization of independent districts..... Took effect by publication, April 8, 1902.		2794					
127	An act to repeal section 2812 of the code, section 1 of chapter 95 of the acts of the twenty-seventh general assembly, and chapter 142 of the acts of the twenty-eighth general assembly, relating to the issuance of school bonds, and to enact a substitute therefor..... Took effect July 4, 1902.	1 2	2812-a 2812-b					
128	An act for compulsory education..... Took effect July 4, 1902.	1-9	2823-a-2823-i					
129	An act to amend section 3016 of the code, relating to bushel weight..... Took effect July 4, 1902.		3016					
130	An act relating to negotiable instruments, repealing sections 3043, 3045, 3049, 3050, 3051, 3052, 3054 and 3055 (chapter 3, title XV) of the code..... Took effect July 4, 1902.	1-196 197 198	<table border="0"> <tr> <td rowspan="4" style="font-size: 2em; vertical-align: middle;">{</td> <td>3060-a-1-</td> </tr> <tr> <td>3060-a196</td> </tr> <tr> <td>3060-a</td> </tr> <tr> <td>3060-a198</td> </tr> </table>	{	3060-a-1-	3060-a196	3060-a	3060-a198
{	3060-a-1-							
	3060-a196							
	3060-a							
	3060-a198							
131	An act to amend section 3225 of the code, relating to support of families of insane persons..... Took effect July 4, 1902.		3225					
132	An act relating to the rights, duties and relations between parent and child by adoption..... Took effect July 4, 1902.		3253					
133	An act to repeal chapter 8 of title XVI of the code, relating to care of friendless children, and to enact a substitute therefor Took effect July 4, 1902.	1-13	3260-a-3260-m					
134	An act to amend section 3287 of the code, relating to the recording of wills..... Took effect July 4, 1902.		3287					
135	An act to amend section 3386 of the code, relating to property rights of one who feloniously takes the life of another..... Took effect July 4, 1902.		3386					
136	An act relating to the rules of descent of estates of children by adoption..... Took effect July 4, 1902.	1-3	3381-a-3381-c					

## THE TWENTY-NINTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
137	An act to amend section 3439 of the code, relating to limitation of action on judgments..... Took effect July 4, 1902.	1 2	3439 3439-a
138	An act to amend section 3497 of the code relating to the place of bringing action..... Took effect by publication, March 6, 1902.		3197
139	An act to amend section 3529 of the code, relating to manner of commencing actions.... Took effect by publication, March 6, 1902.		3529
140	An act to amend section 3825 of the code, making taxes on property in the hands of receivers a preferred claim..... Took effect July 4, 1902.		3825
141	An act to amend section 4544 of the code, relating to garnishment proceedings..... Took effect July 4, 1902.		4544
142	An act relating to kidnapping for the purpose of ransom and prescribing penalty therefor..... Took effect July 4, 1902.	1 2	4750-b 4750-c
143	An act making it a crime to advise or incite the unlawful killing of a human being and fixing the punishment therefor..... Took effect July 4, 1902.		4750-a
144	An act to amend section 4790 of the code, relating to the possession of burglars' tools.... Took effect July 4, 1902.		4790
145	An act to amend section 4807 of the code, relating to malicious mischief and trespass..... Took effect July 4, 1902.		4807
146	An act making it a crime to sell property upon which there is a lien for rent, without consent of the landlord, and fixing penalty therefor..... Took effect July 4, 1902.	1 2	4852-a 4852-b
147	An act to repeal section 4897 of the code, relating to escape from prison, and to enact a substitute therefor..... Took effect July 4, 1902.		4897-a
148	An act defining the crime of sodomy..... Took effect July 4, 1902.		4937-a
149	An act providing for the safety and comfort of laborers in factories or buildings..... Took effect July 4, 1902.	1-4	4999-a-4999-d
150	An act for the preservation of life by the erection of fire escapes Took effect July 4, 1902.	1-6	4999-e-4999j
151	An act amending section 5052 of the code, relating to use or sale of bottles, boxes, etc., of another..... Took effect by publication, February 22, 1902.		5052
152	An act relating to the indictment and punishment of persons who have been convicted of felony two or more times in this state, or in this and other states, and making certain evidence competent proof thereof..... Took effect July 4, 1902.	1 2	5091-a 5091-b
153	An act to amend section 5096 of the code, relating to bail after conviction of certain crimes..... Took effect July 4, 1902.		5096

THE TWENTY-NINTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
154	An act to protect sheriffs in procuring evidence for the identification of criminals, or persons accused of crime..... Took effect July 4, 1902.		5499 a
155	An act to amend section 5707 of the code, relating to employment of persons imprisoned in penitentiary..... Took effect July 4, 1902.		5707
156	An act to amend section 5716 of the code, relating to compensation of officers and employes of the state penitentiaries.... Took effect by publication, March 11, 1902.		5716
157	An act providing for the support of hospitals for the insane, and for the transfer of patients on account of the opening of the hospital at Cherokee..... Took effect by publication, April 11, 1902.	1-3	2291-a-2291-c
158	An act to repeal chapter 69 of the acts of the twenty-seventh general assembly, relating to the practice of osteopathy, and to enact a substitute therefor..... Took effect July 4, 1902.	1-6	2583-a-2583 f
159	An act making provision for the support of the department of the industrial school for boys at Eldora..... Took effect by publication, April 12, 1902.		2713
160	An act to amend section 23 of chapter 118 of the acts of the twenty-seventh general assembly, providing for payment of expenses of state architect..... Took effect by publication, April 18, 1902.		2727-a 23
161	An act to amend section 2 of chapter 25 of the acts of the twenty-eighth general assembly, relating to disbursement of tax money levied and collected for and on account of waterworks..... Took effect July 4, 1902.	1 2	748 748-a
162	An act providing that chapter 25 of the acts of the twenty-eighth general assembly, relating to waterworks, be made applicable to cities under special charters..... Took effect by publication, March 21, 1902.	1	748-b
163	An act to amend section 3 of chapter 30 of the acts of the twenty-eighth general assembly, relating to levy of taxes for park purposes in certain cities..... Took effect July 4, 1902.		852
164	An act to repeal sections 2, 3, 6, and 7 of chapter 45 of the acts of the twenty eighth general assembly, and to enact a substitute therefor; and to amend section 1 of chapter 45 of the acts of the twenty-eighth general assembly, relating to taxation of express companies..... Took effect by publication, March 1, 1902.	1-3 4 5	1346-a-1346-c 1346-f 1346-g
165	An act to amend section 3 of chapter 58 of the acts of the twenty-eighth general assembly, relating to membership in annual convention of department of agriculture..... Took effect July 4, 1902.		1657 d
166	An act to amend section 8 of chapter 58 of the acts of the twenty-eighth general assembly, relating to the construction of street railways upon the state fair grounds..... Took effect by publication, April 4, 1902.		1657-i
167	An act to amend section 2 of chapter 67 of the acts of the twenty-eighth general assembly, relating to savings banks.. Took effect by publication, March 15, 1902.		1848

## THE TWENTY-NINTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
168	An act to amend chapter 83 of the acts of the twenty-eighth general assembly, relating to the inspection and use of petroleum products..... Took effect July 4, 1902.	1	2508-2508-a
169	An act to amend chapter 92 of the acts of the twenty-eighth general assembly, relating to pension money of members of Iowa soldiers' home..... Took effect July 4, 1902.		2606-c
170	An act to amend section 93 of the acts of the twenty-eighth general assembly, relating to the practice of veterinary medicine, surgery and dentistry..... Took effect by publication, April 5, 1902.	1 2 3 4	2538-b 2538-c 2538-e 2538-i
171	An act to repeal chapter 97 of the acts of the twenty-eighth general assembly, and to enact a substitute therefor, levying a tax for state university..... Took effect by publication, April 8, 1902.	1 2	2644-a 2644-b
172	An act to repeal chapter 99 of the acts of the twenty-eighth general assembly, and enact a substitute therefor, levying a tax for the Iowa state college of agriculture and mechanic arts..... Took effect by publication, April 8, 1902.	1-3	2674-a-2674-c
173	An act to repeal sections 2, 3, 4 and 5 of chapter 116 of the acts of the twenty-eighth general assembly; also amending section 168 of the code, and repealing sections 2868, 2869, 2871, 2872, 2873 and 2874 of the code; also repealing chapter 148 of the acts of the twenty seventh general assembly..... Took effect by publication, April 15, 1902.	1-7 8	2888 b-2888-h 168, 2869-a
174	An act to amend chapter 167 of the acts of the twenty-eighth general assembly, relating to monuments for battle field of Shiloh..... Took effect by publication, April 2, 1902.		Omitted.
176	An act to provide for the general levy for state purposes for 1902 and subsequent years..... Took effect by publication, April 18, 1902.	1 2	170-b 170-c
177	An act fixing a uniform time at which all annual appropriations shall begin..... Took effect by publication, April 18, 1902.	1-3	116-a-116 c
207	An act to provide a water supply for military reservations of the United States in this state..... Took effect by publication, February 18, 1902.	1 2	742-d 742-e
210	An act to authorize the improvement of the channels of meandered streams within corporate limits of certain cities..... Took effect by publication, March 15, 1902.	1-16	879-a-879-p
213	An act ceding to the United States jurisdiction over certain lands.....	1-3	4-c-4-e
224	An act to legalize certain proceedings of city and town councils Took effect by publication, February 28, 1902.		658-a
226	An act to legalize the incorporation of certain corporations.... Took effect by publication, March 11, 1902.		1613-a
237	An act to legalize certain conveyances under power of attorney from husband or wife..... Took effect by publication, April 2, 1902.		2942-b
249	An act to legalize certain instruments in writing which were defectively acknowledged..... Took effect July 4, 1902.		2942-e

## A TABLE

Showing sections and parts of the code of 1897, that have been amended or repealed, and substitute enactments passed, by the Twenty-seventh, Twenty-eighth, and Twenty-ninth General Assemblies, with a reference to the chapter of the acts of the particular General Assembly where the same occurs.

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 2930: Amd. 27 G. A. c. 106.  
 2942: Amd. 27 G. A. c. 96. See 26 G. A. Ex. Sess. c. 23; 27 G. A. cc. 165, 166, 182.  
 2943: Amd. 27 G. A. c. 97.  
 2978: Amd. 28 G. A. c. 119.  
 2979: Amd. 27 G. A. c. 98.  
 3016: Amd. 29 G. A. c. 129.  
 3043: Rep. 29 G. A. c. 130.  
 3045: Rep. 29 G. A. c. 130.  
 3049: Rep. 29 G. A. c. 130.  
 3050: Rep. 29 G. A. c. 130.  
 3051: Rep. 29 G. A. c. 130.  
 3052: Rep. 29 G. A. c. 130.  
 3054: Rep. 29 G. A. c. 130.  
 3055: Rep. 29 G. A. c. 130.  
 3138: Amd. 28 G. A. c. 120.  
 3225: Amd. 29 G. A. c. 131.  
 3253: Amd. 29 G. A. c. 132.  
 Tit. XV, c. 3: 29 G. A. c. 130.
- Tit. XVI, c. 8: Rep. and Subst. 29 G. A. c. 133.  
 3287: Amd. 29 G. A. c. 134.  
 Tit. XVII, c. 4: 29 G. A. c. 136.  
 3386: Amd. 29 G. A. c. 135.
- PART THIRD. Code of Civil Practice.**
- 3439: Amd. 29 G. A. c. 137.  
 Tit. XVIII, c. 4: 28 G. A. c. 121.  
 3494: Amd. 27 G. A. c. 99.  
 3497: Amd. 29 G. A. c. 138.  
 3529: Amd. 29 G. A. c. 139.  
 3825: Amd. 29 G. A. c. 140.  
 3847: Amd. 27 G. A. c. 100.  
 3849: Amd. 27 G. A. c. 100.  
 3912: Rep. and Subst. 27 G. A. c. 101.  
 3947: Amd. 27 G. A. c. 102.  
 3948: Amd. 27 G. A. c. 103.  
 3958: Amd. 28 G. A. c. 122.  
 3988: Amd. 27 G. A. c. 104.  
 4027: Amd. 28 G. A. c. 123.  
 4051: Amd. 28 G. A. c. 124.  
 4142: Amd. 27 G. A. c. 105.  
 4259: Amd. 27 G. A. c. 106.  
 4538: Amd. 27 G. A. c. 107.  
 4544: Amd. 29 G. A. c. 141.  
 4606: Amd. 27 G. A. c. 108.  
 4608: Amd. 28 G. A. c. 125.
- PART FOURTH. Code of Criminal Procedure.**
- Tit. XXIV: 27 G. A. c. 109, 29 G. A. c. 152.  
 Tit. XXIV, c. 2: 29 G. A. cc. 142, 143.  
 4790: Amd. 29 G. A. c. 144.  
 Tit. XXIV, c. 4: 28 G. A. c. 127.  
 4807: Amd. 28 G. A. c. 126, 29 G. A. c. 145.  
 4808: Amd. 29 G. A. c. 53.  
 Tit. XXIV, c. 5: 29 G. A. c. 146.  
 4850: Amd. 27 G. A. c. 110.  
 Tit. XXIV, c. 7: 28 G. A. c. 128.  
 4897: Rep. and Subst. 29 G. A. c. 147.  
 Tit. XXIV, c. 8: 27 G. A. c. 111.  
 Tit. XXIV, c. 9: 29 G. A. c. 148.  
 4946: Rep. and Subst. 28 G. A. c. 129.  
 Tit. XXIV, c. 10: 27 G. A. c. 112, 28 G. A. c. 130, 29 G. A. cc. 149, 150.  
 Tit. XXIV, c. 11: 28 G. A. c. 131.  
 5016: Rep. and Subst. 27 G. A. c. 113.  
 Tit. XXIV, c. 12: 28 G. A. c. 133.  
 5034: Amd. 28 G. A. c. 132.  
 5052: Amd. 29 G. A. c. 151.  
 5096: Amd. 29 G. A. c. 153.  
 5240: Amd. 27 G. A. c. 114.  
 5246: Amd. 27 G. A. c. 114.  
 5258: Amd. 28 G. A. c. 134.  
 5274: Rep. and Subst. 27 G. A. c. 115.  
 5373: Amd. 28 G. A. c. 135.  
 Tit. XXV, c. 34: 29 G. A. c. 154.  
 Tit. XXVI: 27 G. A. c. 118, 28 G. A. cc. 142, 143.  
 Tit. XXVI, c. 2: 27 G. A. c. 116, 28 G. A. cc. 102, 138.  
 5662: Amd. 28 G. A. c. 136.  
 5663: Amd. 27 G. A. c. 117.  
 5667: Amd. 28 G. A. c. 136.  
 5685: Amd. 28 G. A. c. 137.  
 5707: Amd. 29 G. A. c. 155.  
 5716: Amd. 29 G. A. c. 156.

# PROVISIONS

## RELATING TO THE CODE SUPPLEMENT.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Approved February 24th, 1902.

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

W. B. MARTIN,  
*Secretary of State.*

## PROVISIONS

### RELATING TO THE CODE AND SUBSEQUENT STATUTES.

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

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

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

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

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

Approved March 22nd, 1902.

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

W. B. MARTIN,  
*Secretary of State.*

# CONSTITUTION OF IOWA.

## State Boundaries.

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

## ARTICLE 1.

### BILL OF RIGHTS.

#### SECTION 1. Rights of persons.

Courts have an undoubted right to inquire into the objects of a tax and to declare invalid all taxes that are levied for other than governmental purposes, and a tax may be held invalid on account of some implied

prohibition of the constitution, but a court will not interfere unless it is clear that the legislature has exceeded its power. *Youngerman v. Murphy*, 107-686.

#### SEC. 6. Laws uniform.

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

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

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

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

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

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

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

The statute (27 G. A. ch. 108) regulating the admissibility of evidence of husband and wife in actions to set aside fraudulent conveyances from one to the other, is not unconstitutional as class legislation since it applies to every person coming within the relation and circumstances provided for. *Burk v. Putnam*, 113-232.

Special privileges and monopolies are always obnoxious, and discriminations against persons or classes still more so. Exclusive privileges and franchises cannot be granted except when absolutely necessary. Therefore held that the exception in Code § 2508, relating to the use of the "Welsbach Hydrocarbon Incandescent Lamp" in burning the lighter forms of petroleum was unconstitutional. *State v. Santee*, 111-1.

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

An ordinance requiring persons riding bicycles on the streets at night to carry a light is not unconstitutional, although no similar provision is made as to persons on other silently running vehicles. *Des Moines v. Keller*, 88 N. W., 827

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

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

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

## SEC. 7. Liberty of speech and the press.

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

While the press enjoys the utmost latitude in reviewing the action of the courts and may after the particular litigation is ended assail with just criticism opinions, rulings and judgments with the weapons of reason, ridicule or sarcasm, it is an act of contempt to publish and distribute in such way that it is likely to fall into the

hands of jurors and witnesses matter which reflects upon one of the parties to the litigation and is intended to indicate the result which should be reached. *Field v. Thornell*, 106-7.

The truth can be shown as a defense only when the publication is made with good motives and for justifiable ends. Except as thus modified the common law relating to libel governs. *State v. Haskins*, 109-656.

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

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

The fact that superior courts are given concurrent jurisdiction with the district courts throughout the county, even in cases where there are two divisions of the county for district court purposes, does not render the statutory provisions as to superior courts unconstitutional under this section. *Page v. Millerton*, 114-378.

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

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

The legislature cannot, by a change in the statute as to limitation of actions, cut off instantaneously the remedy by suit upon an existing cause of action. A reasonable time must be given within which to prose-

cute the action under the new statute. *Cassady v. Grimmelman*, 198-695.

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

The legislature cannot by a retrospective statute require payment of higher fees in case of renewal of a corporation than those provided for by law at the time the legal steps for renewal were taken and tender of the fees then required by law was made. *Lamb v. Dobson*, 90 N. W., 607.

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

Presence of the judge in the court room in a criminal case is essential unless waived by defendant. *State v. Hammer*, 89 N. W. 1083.

Although the treasurer is allowed a commission on taxes collected he is not thereby disqualified from acting under Code Sec. 1374 in enforcing payment of taxes on omitted property. *Beresheim v. Arnd*, 90 N. W., 506.

## SEC. 10. Rights of persons accused.

Defendant is not deprived of privilege of confronting witnesses by provision for admitting testimony of absent witnesses as set out in application for continuance. *State v. Wiltsey*, 103-54.

To allow a material witness for prosecution to give testimony without being sworn is ground for new trial. *State v. Lugar*, 88 N. W. 333.

The statutory provision that defendant asking for a continuance on the ground of the absence of a witness must set out what he expects to prove by such witness, and that a continuance shall not be granted if the opposite party admits the testimony

thus set out, is not unconstitutional as depriving defendant in a criminal case of the right to have his witnesses present. *State v. Wiltsey*, 103-54.

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

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

### SEC. 11. When indictment necessary.

Where an ordinance provided for cumulative penalties for a continuing act, which might amount to more than \$100,

held that the offense was not one within the jurisdiction of a justice of the peace. *State v. Babcock*, 112-250.

### SEC. 12. Twice tried—bail.

While in general an acquittal in a criminal case is not a bar to a subsequent civil action founded on the same facts, yet, where the civil action is to secure a forfeiture which would have been a part

of the penalty to be imposed in the criminal proceeding, and is between the same parties, the previous acquittal is a bar. *State v. Meek*, 112-338.

### SEC. 18. Eminent domain.

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

Benefits from the improvement are not to be considered. *Lough v. Minneapolis & St. L. R. Co.*, 89 N. W. 77.

The land owner is entitled to a trial by a jury of twelve on appeal to the district court, and this proceeding is removable

to the federal court in a proper case. *Kirby v. Chicago & N. W. R. Co.*, 106 Fed. 551.

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

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

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

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

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

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

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

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

The term of limitation for bringing action under provisions of an insurance policy cannot be extended by statute. *Farmers', etc., Co. v. Iowa State Ins. Co.*, 112-608.

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

One who acquires by grant from the state

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

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

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

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

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

The legislature may legalize any act which it might lawfully have authorized in the first instance, and held that it could provide retrospectively that a notice to nonresidents by publication was valid, a proceeding in which such notice might have been authorized. *Fair v. Buss*, 90 N. W., 527.

Where a curative act has removed the invalidity of a contract, such invalidity is not restored by repeal. *Edworthy v. Iowa Sav. & L. Assn.*, 114-770.

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

al as to warrants issued before the statute went into effect. *Phillips v. Reed*, 109-188.

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

### ARTICLE 3.

#### OF THE DISTRIBUTION OF POWERS.

##### SECTION 1. General assembly.

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

of trustees not elected by the people of the municipality. *State ex rel. v. Mayor, of Des Moines*, 103-76.

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

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

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

The intention of this constitutional provision is to prevent the union in the same act of incongruous matter, but it is a unity of object which is to be looked for in the ultimate purpose to be attained and in the details for accomplishing such purpose. *Beresheim v. Arnd*, 90 N. W., 506.

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

The title "An act to amend § 1393 of the Code, relating to building and loan association," held sufficient to cover curative provisions relating to such associations. *Iowa Saving & Loan Assn. v. Selby*, 111-402.

In the absence of any showing of defects in the enactment of the Code, either as a whole or by titles and chapters, the court is not justified in holding that any section or chapter of the Code is void because the subject-matter is not embraced in the title. *Aultman v. Roemer*, 112-651.

##### SEC. 30. Laws general and uniform.

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

A curative statute legalizing the exercise in a particular case of authority given

to counties in general held not to be invalid under this section. *Witter v. Board of Supervisors*, 112-380.

The legislature may legalize a defective notice in proceedings for establishment of a highway without making such legalizing act applicable to other cases. Such a statute cannot be made of general application. *Fair v. Buss*, 90 N. W. 527.

### ARTICLE 5.

#### JUDICIAL DEPARTMENT.

##### SECTION 1. Courts.

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

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

A court cannot be authorized to perform a non-judicial function not connected with the exercise of its judicial power. Therefore held that a statute authorizing the judges of the district court to appoint trustees of city water works, to control and operate such works for the city, was unconstitutional. *State ex rel. v. Barker*, 89 N. W., 204.

**SEC. 8. Style of process.**

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

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

## ARTICLE 7.

## STATE DEBTS.

**SECTION 7. Tax imposed distinctly stated.**

Statutory provisions authorizing cities to impose a tax for water works, to be constructed under contracts to be made in the

future on approval of the electors, are not in violation of this section. *Youngerman v. Murphy*, 107-686.

## ARTICLE 8.

## CORPORATIONS.

**SECTION 2. Property taxable.**

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

as authorizing unequal taxation. *Manchester Ins. Co. v. Herriott*, 91 Fed. 711.

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

But such provision is not unconstitutional

## ARTICLE 10.

## AMENDMENTS TO THE CONSTITUTION.

**SECTION 1. How proposed—submission.**

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

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

## ARTICLE 11.

## MISCELLANEOUS.

**SECTION 1. Jurisdiction of justice of the peace.**

The action of forcible entry and detainer is a summary proceeding involving only the fact of possession, and not necessarily the right of possession, and it may therefore be properly maintained before a justice of the peace. *Herkimer v. Keeler*, 109-680.

Where the question of unlawful detention after the expiration of a lease is alone involved, the constitutional provision limiting the jurisdiction of the justice to a certain sum does not apply. *Ibid.*

**SEC. 3. Indebtedness of political or municipal corporations.**

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

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

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

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

Where the city assumes liability to the contractor for cost of street improvement, such liability becomes the indebted-

ness of the city. *Allen v. Davenport*, 107-90.

A paving contract, obligating the city to pay the cost of paving certain street intersections, is not wholly void, although the city is already indebted beyond its constitutional limit, and the contractor may take advantage of any portion of the contract which the city had power to make. *Ft. Dodge Elec. L. & P. Co. v. Ft. Dodge*, 89 N. W., 7.

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

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

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

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

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

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

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

Recovery cannot be had upon a series of bonds which of themselves exceed the constitutional limitation by simply saying that the series were sold for cash and that

if the county official had properly used the proceeds in payment of existing indebtedness the total debt of the corporation would not have been increased. The party advancing money under such bonds is bound to take notice of the constitutional limitation and is charged with the knowledge that, to create a valid claim against the corporation, the money he advances must be used in payment of valid indebtedness. *Etna L. Ins. Co. v. Lyon County*, 82 Fed. 929.

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

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

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

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

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

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

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

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

The amount of outstanding illegal war-

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

Negotiable refunding bonds, authorized by statute to be issued in exchange for valid outstanding evidences of indebtedness in the hands of purchasers for value before maturity will be presumed to have been so issued, and not to have increased the indebtedness of the corporation. *Lyon County v. Keene Five Cent Sav. Bank*, 100 Fed. 337.

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

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

Where it is claimed that a portion of an issue of bonds is invalid because in excess of the constitutional limit of indebtedness, a court of equity may inquire into the facts to ascertain what part, if any, of the debt is enforceable. *Everett v. Independent Sch. Dist.*, 109 Fed. 697.

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

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

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

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

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

The purchaser of bonds is not entitled to rely on the recitals therein that the debt created does not exceed the constitutional limit. *Fairfield v. Rural Ind. Sch. Dist.*, 111 Fed. 453

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

#### SEC. 5. Oath of office.

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

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

SUPPLEMENT  
TO  
THE CODE OF IOWA.

AS AUTHORIZED BY THE CODE AND THE TWENTY-NINTH  
GENERAL ASSEMBLY.

PART FIRST.

PUBLIC LAW.

TITLE I.

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

CHAPTER 1.

OF THE SOVEREIGNTY AND JURISDICTION OF THE STATE.

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

[There are numerous special acts, ceding to the United States, and relinquishing state jurisdiction over the ground in various cities, upon which government buildings are located, and one relating to the ground upon which the Floyd monument is located in Woodbury county. These special acts, however, it is deemed best not to insert in this work, but resort should be had to the session laws for each particular act.—Ed.]

**SEC. 4-b. Consent to acquisition of lands.** That the consent of the state of Iowa is hereby given, in accordance with the seventeenth clause,

eighth section, of the first article of the constitution of the United States, to the acquisition by the United States, by purchase, condemnation, or otherwise, of any land in this state required for sites for custom houses, court houses, postoffices, arsenals, or other public buildings whatever, or for any other purposes of the government. [29 G. A., ch. 213, § 1.]

**SEC. 4-c. Exclusive jurisdiction.** That exclusive jurisdiction in and over any land so acquired by the United States shall be, and the same is hereby ceded to the United States, for all purposes except the service upon such sites of all civil and criminal process of the courts of this state; but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands. [29 G. A., ch. 213, § 2.]

**SEC. 4-d. Exempt from taxation.** The jurisdiction ceded shall not vest until the United States shall have acquired the title to the said lands by purchase, condemnation or otherwise; and so long as the said lands shall remain the property of the United States when acquired as aforesaid, and no longer, the same shall be and continue exempt and exonerated from all state, county and municipal taxation, assessment or other charges which may be levied or imposed under the authority of this state. [29 G. A., ch. 213, § 3.]

### CHAPTER 3.

#### OF THE STATUTES.

#### SECTION 36. Acts taking effect by publication.

[For earlier annotations see code, page 118.—Ed.]

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

**SEC. 41-a. Repeal—Amendments—reference to amended act.** That section forty-one (41) of the code, be and the same is hereby repealed, and the following enacted in lieu thereof:

Every act passed in amendment or repeal of a law shall in its title refer to the law so amended or repealed as follows:

1. One which amends or repeals a section or sections of the code shall refer to the section or sections so amended or repealed.

2. One which amends or repeals a chapter of the code shall refer to the chapter; also to the title containing the same.

3. One which amends or repeals an act of the general assembly not contained in the code, shall refer to the chapter so amended or repealed and to the number of the general assembly which passed the act.

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

5. Whenever reference is made to any section, chapter or title of the code, the number of the section, chapter or title shall be expressed in words, followed by the figures in parenthesis. [27 G. A., ch. 2.]

#### SEC. 48. Construction.

[For earlier annotations, see code, pages 120-5.—Ed.]

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

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

**Par. 2. Words and phrases.** Where a statute made special provision as to the use of a certain lamp by name by which it

was admitted described that lamp only, held that it was not competent to extend the provision so as to include other lamps constructed on the same principle. *State v. Santee*, 111-1.

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

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

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

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

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

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

## CHAPTER 4.

### OF THE CODE AND ITS OPERATION.

#### SECTION 49. Citations—repeal of prior statutes.

[For earlier annotations, see code, page 126.—Ed.]

This section is an express repeal of statutes previously in force. *West v. Bishop*, 110-410. Section applied. *Greaves v. Posner*, 112-651.

#### SEC. 51. Existing rights not affected.

[For earlier annotations, see code, pages 126-7.—Ed.]

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

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

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

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

A limitation of action is not a vested right which remains unaffected by subsequent change of the statute, but so far as such limitation affects an obligation

already accrued it is not affected by such repeal. *Norris v. Tripp*, 111-115.

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

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

Where the prior statute gives a mere privilege, and not a contract or vested right, such privilege is not preserved by this section after the repeal of the statute by the adoption of the Code. *Miller v. Hagemann*, 111-195.

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

Liability of parties with reference to work done under ordinance authorizing special improvements at the expense of abutting property owners is not affected by the repeal by the Code of the statutes under which such ordinance was passed. *Ft. Dodge Elec. L. & P. Co v. Ft. Dodge*, 89 N. W., 7.

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

## TITLE II.

### OF THE EXECUTIVE DEPARTMENT.

#### CHAPTER 1.

##### OF THE GOVERNOR.

#### SECTION 62. **May offer rewards for arrests.**

[For earlier annotations, see code, page 129.—Ed.]

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

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

[By chapter 1 of the twenty-ninth general assembly the governor's salary is increased from three to five thousand dollars, but it is provided that the same shall not take effect until after the termination of the present gubernatorial term.—Ed.]

#### CHAPTER 2.

##### OF THE SECRETARY OF STATE.

#### SECTION 66. **Duties—records to be kept.**

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

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

[For earlier annotations, see code, page 132.—Ed.]

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

#### CHAPTER 3.

##### OF THE AUDITOR OF STATE.

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

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

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

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

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

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

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

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

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

[For annotation, see code, page 134—Ed.]

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

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

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

12. *To apportion school fund interest.* He shall, on the first Monday of March and September of each year, apportion the interest of the permanent school fund among the several counties in proportion to the number of persons between five and twenty-one years of age in each, as shown by the last

report filed with him by the superintendent of public instruction. [22 G. A., ch. 82, § 27; C. '73, § 66; R., §§ 71, 1967; C. '51, § 50.] [28 G. A., ch. 2.]

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#### CHAPTER 4.

##### OF THE TREASURER OF STATE.

**SECTION 104. Payment of warrants—interest on when no funds.** He shall pay no money from the treasury but upon the warrants of the auditor, and only in the order of their presentation; or, if there is no money in the treasury from which such warrants can be paid, he shall, upon request of the holder, indorse upon the warrant the date of its presentation and sign it, from which time the warrant shall bear interest at the rate of five per cent. per annum until the time directed in the next section. [C. '73, § 78; R., § 86; C. '51, § 65.] [27 G. A., ch. 3.]

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

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#### CHAPTER 4-A.

##### OF THE TIME AT WHICH ALL ANNUAL APPROPRIATIONS SHALL BEGIN.

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

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

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

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#### CHAPTER 4-B.

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

**SECTION 116-d. Treasurer of state to notify county auditor and treasurer of receipt.** Whenever the treasurer of state receives money known as swamp land indemnity, which is paid to the state of Iowa by the United States government under the provisions of acts of congress approved

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

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

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

#### CHAPTER 4-C.

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

**SECTION 116-g. Defense—Appeal.** Whenever any taxes or fees have been collected by the treasurer of state of this state, acting under the authority of the code, or any act of the general assembly, and covered into the state treasury, and any suit or action is brought against said treasurer, either as such, or as an individual, to recover back such taxes or fees so collected and covered into the treasury of the state, whether the term of office of such treasurer has expired or not, it shall be the duty of the attorney-general, upon the request of the defendant, to appear and make defense to such action. If, upon final hearing of such suit or action, it shall be determined that such taxes or fees were wrongfully collected and covered into the state treasury, it shall be the duty of the attorney-general to appeal said suit or action to the supreme court, unless in his opinion such appeal would be useless, in which case he shall render his opinion, with a copy of the proceedings had in court, to the executive council, who may either order the appeal to be taken, and that the attorney-general shall proceed therewith, or accept the decision, and their order shall be final. If appeal be taken by the defendant it shall supersede execution, without bond. [29 G. A., ch. 3, § 1.]

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

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

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

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

## CHAPTER 5.

### OF THE PUBLIC PRINTING AND BINDING.

**SECTION 118. How work to be delivered.** The state printer shall promptly deliver to the state binder the printed sheets of laws, journals, and other publications, as the work progresses, as well as all other work requiring stitching, or binding, and the state binder shall, upon the completion of the work as required, deliver to the secretary of the state, at the document room, all documents, journals, reports, official registers, laws, and all other publications which the secretary of state is, or may hereafter be required, by law, to distribute, taking his duplicate receipt for the same, one copy of which shall be delivered to the secretary of the executive council, who shall give the printer credit for the paper necessarily used in the manufacture of said publication; and it is the duty of the secretary of state to see that the proper number of copies is so delivered. All other printing shall be promptly delivered to the secretary of the executive council, at the supply department, by the state printer and state binder. The state printer shall make certificate to the secretary of the executive council, of the paper necessarily used in the printing of each and every job or publication upon the presentation of the same, and after delivery of the work, the secretary of the executive council shall credit the state printer with the paper necessarily so used. [22 G. A., ch. 82, § 4.] [29 G. A., ch. 4, § 1.]

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

**SEC. 120. Secretary of state to examine and certify work.** The secretary of state, upon the completion of any printing or binding for the

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

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

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

**SEC. 125. Number of copies to be printed.** There shall be printed of the various public documents the number of copies hereinafter designated, to wit: Of the biennial message, three thousand copies; of the inaugural address, twenty-five hundred copies; of the biennial report of the auditor of state, three thousand copies; of the report of the superintendent of public instruction, four thousand five hundred copies; of the report of the agricultural college, and of the report of the state board of health, three thousand copies each; of the report of the bureau of labor statistics, four thousand copies; of the annual report of the auditor upon insurance, six thousand copies; of the report of the commissioner of pharmacy, three thousand copies; of the report of the railroad commissioners, four thousand copies, two thousand of which shall be bound in cloth; of the report of the board of control, four thousand copies, two thousand of which shall be bound in cloth; of the report of the annual assessment of railroad property, two thousand copies to be bound in paper; of the report of the secretary of state pertaining to lands, two thousand copies; of the report of the state visiting committee to the

hospitals for the insane, two thousand copies; of the report of the state inspector of oils, and of the examiners in dentistry, two thousand copies each; of the reports of the joint committees of the general assembly to visit state institutions, fifteen hundred copies; of the proceedings of the pioneer law-makers' association, twelve hundred copies, five hundred of which shall be delivered to the association; and of all other reports not herein specified, two thousand copies, unless the executive council shall direct a greater number to be printed, not exceeding four thousand. Of said reports, five hundred copies each of the biennial message, inaugural address, auditor's biennial report, treasurer's biennial report; attorney-general's biennial report, the report of the superintendent of public instruction, agricultural college, board of health, commissioner of pharmacy, secretary of state pertaining to lands, secretary of state's report of criminal convictions, the auditor's annual report pertaining to insurance, and the report of the bureau of labor statistics, the report of the adjutant-general, shall be bound in cloth; all other reports shall be bound in paper covers, and reports of the legislative visiting and special committees shall be printed and stitched without covers. [23 G. A., ch. 52, § 1; 22 G. A., ch. 82, § 11.] [28 G. A., ch. 4, § 1.] [29 G. A., ch. 6, § 1.]

**SEC. 126. Distribution of documents—by and to whom.** The secretary of state shall make distribution of the various public documents turned over to him, as follows:

1. The secretary of state shall distribute to each member of the general assembly one copy of the various public documents, and, upon request, such additional number as the secretary of state may provide for, and such remaining number as is not necessary to be retained for future general assemblies shall be distributed upon special calls made therefor.

2. Fifteen hundred copies shall be stitched and bound in half-sheep, containing a copy of each report, to be arranged under the direction of the secretary of state. Some distinctive mark shall be put on the even-numbered pages of each document, to indicate its place in the bound document, with the year of the report on each odd-numbered page, and in each volume shall be placed a table of contents of all the volumes.

3. The foregoing fifteen hundred copies shall be distributed as follows: Five hundred copies to the state library for the use of the state library commission, to be used for library purposes, only after the remaining copies have been distributed by the secretary of state; one copy to the lieutenant-governor, to the speaker, to each member of the general assembly, to the secretary of the senate and to the clerk of the house of representatives; one copy each to the governor of the state and his private secretary, the secretary of state, the auditor of state, the treasurer of state, the attorney-general, the superintendent of public instruction, the clerk and reporter of the supreme court and each of their deputies, the commissioner of labor statistics, the adjutant-general, the custodian of the capitol, and the fish commissioner; one copy to each judge of the supreme court; one copy to each railroad commissioner, mine inspector, and commissioner of pharmacy; one copy to the state librarian, and the secretary of the board of health, respectively; one copy to each state institution, to remain therein; one copy to the office of each county auditor, to remain therein; forty copies to the historical society; one copy to each of the other states and each territory reciprocating the same, and to each foreign nation or province desiring to exchange like reports; twenty-five copies to the state library; the remaining copies to be placed under the control of the secretary of state, to be disposed of as he may see fit. The transportation charges on all matter distributed under this section shall be paid for by the state.

4. He shall furnish to the library of congress two copies of all legislative journals and reports of state offices, immediately upon their publication.

5. Six hundred copies of the message, two hundred copies of each of the reports of the joint visiting committees, and five hundred copies of each of the other documents, shall remain with the state for the use of the future general assemblies, and to supply special calls therefor.

6. The copies not above disposed of shall be distributed to the officers, institutions and committees making report. [23 G. A., ch. 52, § 2; 22 G. A., ch. 82, § 12; C. '73, § 64.] [27 G. A., ch. 4, § 1.] [29 G. A., ch. 6, § 2.]

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

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

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

## CHAPTER 6.

### OF THE CUSTODIAN OF PUBLIC BUILDINGS.

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

**SEC. 152-a. Assignment of rooms at state house.** That the rooms in the capitol building, numbers eleven and twelve, on the first floor, now

occupied by the state agricultural society; room number eleven as a library and exhibition room, and room number twelve as a business room; be and the same are hereby assigned to the said state agricultural society for its permanent use and occupation, subject only to the action of the general assembly of the state of Iowa. [27 G. A., ch. 6, § 1.]

## CHAPTER 7.

### OF THE EXECUTIVE COUNCIL.

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

**SEC. 161.** The executive council shall annually, and oftener in its discretion, make a full settlement between the state of Iowa and all state officers, commissioners, boards, departments and all persons receiving, handling or expending state funds except institutions under the control of the board of control.

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

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

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

**SEC. 163-a. Biennial reports by state officers—publication by executive council—what to contain.** All state officers, boards, commissions, and institutions, except those under the management of the board of control, shall biennially, on or before September 1st of each year prior to the convening of the general assembly, make to the executive council, for the preceding biennial period ending June 30th, an itemized and classified report, verified by oath, of all salaries and expenses paid, including supplies and paper drawn and printing and binding done. The report shall show out of what particular funds, fees, or moneys such expenditures have been made, also the disposition in detail of all fees and moneys collected. [28 G. A., ch. 6, § 1.]

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

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

**SEC. 164. Supervision of capitol—contracts—auditing of bills.**

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

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

**SEC. 166. Advertise for sealed proposals.** The council shall, from time to time, make estimates of the kind, quantity and quality of the articles needed and authorized to be purchased by it, as provided in the preceding section, and shall cause the secretary thereof to advertise for sealed proposals therefor in two newspapers published at the seat of government, and such others as it may deem expedient, except that postage stamps, postal cards, and stamped envelopes may be purchased without advertising, at the government prices, and the executive council may audit bills for postage, necessarily required for state purposes, at the time the same is ordered. When so audited the auditor of state shall draw warrants for the same upon the proper fund, which the treasurer of state shall pay upon presentation. Such advertisement shall state the kind, quantity and quality, and time and place of delivery, of the articles to be purchased, and that such proposals shall be filed with the secretary of the council, the time and place where all bids will be opened, and such other matters as the council may direct. Bills for such advertising shall be subscribed and sworn to by the persons entitled thereto, and, when the same are audited by the executive council, the auditor shall draw warrants therefor. [C. '73, § 121; R., § 2169.] [28 G. A., ch. 7, § 1.]

**SEC. 168. Supplies and postage—to whom furnished.** The executive council shall take charge of all property purchased under the provisions of this chapter, and shall keep a full, accurate, complete and itemized account of all such property, with the cost and disposition thereof. The council shall supply the governor, secretary, auditor, treasurer, judges of the supreme court and clerk thereof, attorney-general, supreme court reporter, superintendent of public instruction, railroad commissioners, adjutant-general, the dairy commissioner, the historical department, the mine inspectors, the labor commissioner, the horticultural department, traveling

library and Iowa library commission, and other officers entitled thereto by law, the general assembly, its committees, and the clerks, secretaries and special and standing committees of either house thereof, with all such articles required for the public use, and necessary to enable them to perform the duties imposed upon them by law. Postage shall not be furnished to the general assembly, its officers, employes, or to any committee of either branch thereof. It shall also furnish the public printer with all paper required for the various kinds of public printing, in such quantities as may be needed for the prompt discharge of his duties. Supplies, including postage and stationery, shall be furnished to the officers and persons entitled thereto by law, only in the manner provided in this chapter. [20 G. A., ch. 119; C. '73, § 122; R., § 2170.] [29 G. A., ch. 173, § 8.]

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

**SEC. 170-b. Levy—duty of executive council.** The executive council shall in the year nineteen hundred two (1902) fix the rate per centum to be levied upon the valuation of the taxable property of the state necessary to yield for general state purposes approximately the sum of two million three hundred thousand dollars (\$2,300,000.00) and in the year nineteen hundred three (1903) shall fix the rate necessary to yield approximately the sum of two million dollars (\$2,000,000.00). [29 G. A., ch. 173, § 1.]

**SEC. 170-c. Shall certify rate.** The executive council shall certify the rate necessary to the auditor of each county. [29 G. A., ch. 173, § 2.]

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## CHAPTER 8.

### OF THE CENSUS.

#### SECTION. 177. Publication to be evidence.

Whenever the number of inhabitants or as shown by the Official Register, will the population of counties, cities or control. *In re Sale of Intoxicating Liquors*, 108-368.

## TITLE III.

### OF THE JUDICIAL DEPARTMENT.

#### CHAPTER 1.

##### OF THE ORGANIZATION OF THE SUPREME COURT.

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

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

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

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

#### **SEC. 198. Opinions to be filed.**

[For earlier annotations, see code, page 154.—Ed ]

No written opinion is required where no opinion necessary. *Clay v. Maynard Sav.* question of law is involved rendering an *Bank*, 104-748.

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

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

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

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

## CHAPTER 3.

## OF THE ATTORNEY-GENERAL.

**SECTION 208. Office—duties.**

[For earlier annotations, see code, page 155.—Ed.]

The attorney general has nothing to do with an appeal in a criminal case until it reaches the supreme court. It is within the duty of the county attorney to take the appeal and give notice thereof. *State v. Grimmel*, 88 N. W. 342.

## CHAPTER 5.

## OF THE DISTRICT COURT.

**SECTION 225. Jurisdiction—civil, criminal, probate.**

[For earlier annotations, see code, pages 159-161.—Ed.]

**Criminal.** The criminal jurisdiction of the district court attaches at the time of the service of the warrant issued upon an indictment, and from that time it has control of the person of defendant, not only for the purpose of criminal investigation but for all matters incident to such control. Therefore authority cannot be given by statute to commissioners of insanity to determine the question of insanity of a prisoner under arrest. *Stone v. Conrad*, 105-21.

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

Administration can only be granted in the county of the residence of deceased at the time of his death and such administration granted in another county, even the county of the residence of deceased in such county will be void. *In re King's Estate*, 105-320.

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

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

An order in a guardianship matter, under the provisions of Code § 3261 with reference to probate jurisdiction, may be made by consent of parties in another county in the same district, and will become a valid and binding adjudication

when entered on the record in the proper county. *Steiner v. Lentz*, 110-49.

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

An action to set aside the final discharge of an administrator for fraud need not be brought in the probate court. *Tucker v. Stewart*, 114—, 86 N. W., 370.

An action brought by a widow for an order upon her deceased husband's administrator to pay her distributive share of the assets of the estate, is properly on the probate docket. *Duffy v. Duffy*, 114-581.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**SEC. 241. Judges not to sit together.**

[For earlier annotations, see code, page 165.—Ed.]

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

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

ceedings of a court, there is no error in the succeeding judge doing that which the trial judge might have done, and at the suggestion of such trial judge. *Renner v. Thornburg*, 111-515; *State v. Jones*, 88 N. W., 196.

**SEC. 242. Record to be signed.**

[For earlier annotations, see code, pages 165-6.—Ed.]

Even where the record of a judgment does not follow the written directions of the judge, it must be treated, in the absence of any showing to the contrary, as truly evidencing the decision of the

court, for a change in the views of the judge will be presumed rather than that the record is other than valid. *Christie v. Iowa L. Ins. Co.*, 111-177.

**SEC. 243. Court controls record.**

[For earlier annotations, see code, pages 166-7.—Ed.]

A court may vacate and set aside its judgment when such judgment is unwarranted by the record. *Cooper v. Disbrow*, 106-650.

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

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

succeeding term. *Perry v. Kaspar*, 113-268.

It is doubtful whether the district court has inherent power to suspend or supersede its judgments and orders pending an appeal; but at any rate a judge in vacation and acting in another county has no power to suspend the operation of a decree of the court duly entered. *Whitlock v. Wade*, 90 N. W., 587.

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

**SEC. 244. Corrections.**

[For earlier annotations, see code, pages 167-8.—Ed.]

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

A court may during the term without notice modify a decree already entered. The record referred to in this and the preceding section is not the formal decree signed by the judge and kept in the record, but the record itself as found in the books which clerks are authorized to keep, and this record may be amended

and corrected at any time before it is signed. Such correction may be made by a court on its own motion. If made at a subsequent term it must as a general rule be with notice to the parties interested. *McConnell v. Avey*, 90 N. W., 604.

An amendment to a decree made at a subsequent term of court and without notice to the defendant is of no validity as to him. *Browne v. Kiel*, 90 N. W., 624.

**SEC. 245-a. Reporters' notes as evidence.** That the original shorthand notes of the evidence, or any part thereof, heretofore or hereafter taken upon the trial of any cause or proceeding, in any court of record of this state, by the shorthand reporter of such court, or any transcript thereof, duly certified by such reporter, when material and competent, shall be admissible in evidence on any retrial of the case or proceeding in which the same were taken, and for purposes of impeachment in any case, and shall have the same force and effect as a deposition, subject to the same objections so far as applicable. It shall be the duty of any such reporter, upon demand by

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

#### SEC. 247. Decisions in vacation.

[For earlier annotations, see code, pages 168-9.—Ed.]

Where the trial judge filed with the clerk a finding of facts with his conclusions of law, ending with a direction that judgment be entered, but no judgment was entered in accordance therewith, held that there was not a decision of the case in vacation. *Christie v. Iowa L. Ins. Co.*, 111-177.

Attorneys cannot by agreement not

reduced to writing nor entered on the records of the court agree to the submission of a case to be determined in vacation. *Whitlock v. Wade*, 90 N. W., 507.

A judge in vacation and acting in another county cannot suspend the decree of a court duly entered. A judge in vacation has no authority except such as is expressly given him by statute. *Ibid.*

**SEC. 253. Salary of judges.** The salary of each judge of the district court shall be three thousand five hundred dollars per year. [21 G. A., ch. 134, § 12.] [29 G. A., ch. 13, § 1.]

#### SEC. 254. Compensation of shorthand reporters.

[For earlier annotations, see code, page 170.—Ed.]

The application for an order for a transcript at the expense of the county for the purpose of prosecuting an appeal should be made to the trial judge. The expense of the transcript, if the order is made, should be paid by the county in which the case is tried, although it is brought to that county on change of venue. *State v. Cater*, 109-69.

While the judge may have some discretion as to ordering a transcript at the expense of the county, yet if he finds that the defendant is unable to pay for such transcript, he should order it with-

out regard to his judgment as to whether defendant has had a fair trial. *State v. Robbins*, 106-688.

The provision with reference to ordering the transcript of the shorthand notes in a criminal case to be paid for at the expense of the county does not give the trial judge absolute discretion to determine the question. His ruling in the matter is subject to review on appeal, under Code § 4101. *State v. Wright*, 111-621; *State v. Gray*, 87 N. W., 416; *State v. Height*, 88 N. W., 331.

**SEC. 254-a. Repeal.** That section two hundred fifty-four (254) of the code be and the same is hereby repealed and the following enacted in lieu thereof. [29 G. A., ch. 14, § 1.]

**SEC. 254-b. Reporter—compensation.** Shorthand reporters of the district courts shall be paid six (\$6.00) dollars per day for each day's attendance upon said court, under the direction of the judge, out of the county treasury where such court is held, upon the certificate of the judge holding

the court; and in case the total per diem of each reporter shall not amount to the sum of one thousand two hundred dollars (\$1,200.00) per year, the judge appointing him shall at the end of the year apportion the deficiency so remaining unpaid among the several counties of the district, if there be more than one county in such district, in proportion to the number of days of court actually held by said judge in such counties, which apportionment shall be by him certified to the several county auditors, who shall issue warrants therefor to said reporter, which warrants shall be paid by the county treasurers out of any funds in the treasury not otherwise appropriated.

Shorthand reporters shall also receive six cents per hundred words for transcribing their official notes, to be paid for in all cases, by the party ordering the same. If a defendant in a criminal cause has perfected an appeal from a judgment against him and shall satisfy a judge of the district court from which the appeal is taken that he is unable to pay for a transcript of the evidence, such judge may order the same made at the expense of the county where said defendant was tried. [29 G. A., ch. 14, § 2.]

**SEC. 254-c. Taxed as part of costs.** A charge of six dollars (\$6.00) per day for reporting in all cases, except where the defendant in a criminal case is acquitted, shall be taxed as part of the costs in the case by the clerk of the court and paid into the county treasury when collected. [29 G. A., ch. 14, § 3.]

#### CHAPTER 5-A.

##### OF APPOINTMENT OF TRUSTEES BY DISTRICT COURT TO MANAGE, CONTROL AND INVEST CEMETERY FUNDS.

**SECTION 254-d. Trustee—appointment.** Any owner or owners of any cemetery, or any party or parties interested therein, may by petition presented to the district court of the county where the cemetery is situate, have appointed a trustee with authority to receive any and all moneys that may be donated for and on account of said cemetery or any part thereof and to invest, manage and control same under the direction of the court; but he shall not be authorized to receive any gift, except with the understanding that the principal sum is to remain and be a permanent fund, and only the net proceeds therefrom to be used in carrying out the purpose of the trust created, and all such funds shall be exempt from taxation so far as consistent with the regulations governing the association owning or controlling the ground where the lot is located. [29 G. A., ch. 15, § 1.]

**SEC. 254-e. Receipt attested by clerk—"Cemetery Record."** Every such trustee shall execute and deliver to the donor a receipt showing the amount of money received, and the use to be made of the net proceeds from same. Such receipt shall be duly attested by the clerk of the court granting letters of trusteeship and a copy thereof signed by the trustee and so attested shall be filed with and recorded by the clerk in a book to be known as the "Cemetery Record," and in which shall be recorded all reports and other papers, including orders made by the court or judge relative to cemetery matters. [29 G. A., ch. 15, § 2.]

**SEC. 254-f. Loans—security.** It shall be the duty of such trustee to loan all moneys received by him, under the direction and with the approval of the court, but only as same may be secured by first mortgage upon Iowa real estate, and no loan shall be made or approved, unless it be made to appear upon oath of three disinterested citizens that such real estate is worth at least double the amount of the loan applied for, and that the title to same is good of record and in fact in the party making application therefor. [29 G. A., ch. 15, § 3.]

**SEC. 254-g. Bond—approval—oath.** Every such trustee, before entering on the discharge of his duties or at any time thereafter when required

by the court or judge must give bond in such penalty as may be required by the court, to be approved by the clerk, conditioned for the faithful discharge of the duties imposed on him by law and take and subscribe an oath the same in substance as the condition of the bond, which oath and bond must be filed with the clerk. [29 G. A., ch. 15, § 4.]

**SEC. 254-h. Clerk—duty of—additional bond.** It shall be the duty of the clerk at the time of filing each and every receipt mentioned in section two of this act, to at once advise the court or judge as to the amount of the principal fund in the hands of such trustee, the amount of bond filed, and whether or not it is good and sufficient for the amount given, to the end that the court or judge may, if to him it seems best, require a new or additional bond. [29 G. A., ch. 15, § 5.]

**SEC. 254-i. To serve without compensation—expenses.** Trustees appointed under this act shall not be entitled to receive any compensation for services rendered, but may out of the income received pay all proper items of expense incurred in the performance of their duties, including cost of bond, if any. [29 G. A., ch. 15, § 6.]

**SEC. 254-j. Annual report.** It shall be the duty of every such trustee to make full report of his doings in the matter of his trusteeship in the month of January following his appointment and in January of each successive year. In each of said reports he shall apportion the net proceeds received from the sum total of the permanent fund and make proper credit to each of the separate funds assigned to him in trust. [29 G. A., ch. 15, § 7.]

**SEC. 254-k. Removal.** Any such trustee may be removed by the court or judge thereof at any time for cause and in the event of removal or death, the court or judge must appoint a new trustee and require his predecessor or his personal representative to make full accounting with him for all the property belonging to such trusteeship. [29 G. A., ch. 15, § 8.]

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## CHAPTER 6.

### OF THE SUPERIOR COURTS.

**SECTION 255. Establishment and effect of.** Any city in this state containing five thousand inhabitants, whether organized under a special charter or the general law for the incorporation of cities and towns, may establish a superior court as hereinafter provided, which, when established, shall take the place of the police court of such city. [21 G. A., ch. 2; 19 G. A., ch. 24, § 1; 16 G. A., ch. 143, § 1.] [29 G. A., ch. 16, § 1.]

**SEC. 256-a. Repeal—submission to voters—election of judge—term—commission.** That section two hundred fifty-six (256) of the code is hereby repealed, and the following enacted in lieu thereof:

Upon the petition of one hundred citizens of any such city, the mayor, by and with the consent of the council, may, at least ten days before any general election, issue a proclamation submitting to the qualified voters of said city, the question of establishing said court. Should a majority of all the votes cast at such election upon such proposition be in favor of said court, the same shall thereby be established. The judges of all superior courts now or hereafter established shall be elected at the last general election preceding the expiration of the term of office of the present incumbent. The names of candidates for judge to be upon the same ballot as used in the city for state, county and township officers and the vote to be returned and canvassed in the same manner as for county officers. Certificates of nomination of candidates for judge by conventions or primaries of political parties and nominations by petition, shall be filed with the auditor of the county in which said

city is situated within the same time as provided by law for the filing of certificates of nomination and nominations by petition for offices to be filled by the electors of counties. Each judge shall qualify and hold his office for the term of four years from the first day of January next ensuing after said election, and until his successor is elected and qualified, provided, however, that the term of office of successors of the present incumbents shall begin at the expiration of the term of the present incumbent and shall expire on the thirty-first day of December of the third year following the beginning of their term. Immediately after the election of any judge, the board of supervisors of said county shall transmit a certificate of the election of said judge to the governor of the state, who shall thereupon issue to him a commission empowering him to act as judge as herein provided. [19 G. A., ch. 24, § 2; 16 G. A., ch. 143, § 2.] [28 G. A., ch. 9, § 1.]

**SEC. 258-a. Repeal—vacancy—inability.** That section two hundred fifty-eight (258) of the code is hereby repealed and the following enacted in lieu thereof:

That in case of vacancy in said office the governor shall appoint a judge who shall hold the office until the next general election, and in case of inability of any judge to act through sickness or any other cause a judge shall be appointed by the governor to hold during such inability. [26 G. A., ch. 77; 16 G. A., ch. 143, § 4.] [28 G. A., ch. 9, § 2.]

**SEC. 260. Jurisdiction.**

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

**SEC. 261. Changes of venue—change of venue for nonresidents—no jury in criminal cases.** Changes of venue may be taken from said court in all civil actions to the district court of the same or another county, in the same manner, for like causes and with the same effect as the venue is changed from the district court. But in all civil cases where any party defendant shall, before any pleading is filed by him, file in said cause a motion for a change of venue to the district court of the county, supported by affidavit showing that such party defendant was not a resident of the city where such court is held, at the time of the commencement of the action, the cause, upon such motion, shall be transferred to the district court of the county. All criminal actions, including those for the violation of the city ordinances, shall be tried summarily and without a jury, saving to the defendant the right of appeal to the district court, which appeal shall be taken in the same time and manner as appeals are taken from justices' courts in criminal actions. [22 G. A., ch. 40, § 2; 19 G. A., ch. 24, § 4; 16 G. A., ch. 143, § 7.] [28 G. A., ch. 10, § 1.]

[For annotations, see code, page 173.—Ed.]

**SEC. 266. Marshal as sheriff.**

A constable is not authorized to act as officer of the superior court, and a writ of attachment issuing from such court should not be directed to such officer. *Freeman v. Lind*, 112-39.

**SEC. 273. Judgments made liens by transcript.**

[For earlier annotations, see code, page 174.—Ed.]

The effect of the filing of a transcript of the judgment of the superior court in the district court is to transfer to the district court the power to enforce the judgment of the superior court. No further proceedings can be had on the judgment in the superior court. *Oyster v. Bank*, 107-39. A creditor who has recovered judgment in a superior court which has not been filed in a district court so as to become a lien on real property cannot proceed by equitable action to subject real property to payment of his claim. *Peterson v. Gittings*, 107-306.

**SEC. 276. Question of abolishing court to be submitted.** Upon the petition of one-third of the qualified electors of any city in which a superior court is now or hereafter established, the mayor, by and with the consent of

the council of such city, shall, at least ten days before any general election or election for city officers, issue a proclamation submitting to the qualified voters of said city the proposition to abolish the superior court. The ballots shall be printed, and in the following form: "Shall the proposition to abolish the superior court of \_\_\_\_\_ be adopted?" and the election shall be conducted in all respects in accordance with the provisions of the election law. [24 G. A., ch. 5, § 1.] [28 G. A., ch. 9, § 3.]

**SEC. 285. No business done on Sunday, except.**

[For earlier annotations, see code, page 176.—Ed.]

Judicial business may be transacted on the fourth of July and a witness may be punished for contempt in not appearing on that day in response to a subpoena. *Chambers v. Oehler*, 107-155.

A ministerial act, such as the service of a notice, not forbidden on Sunday, will not be illegal because performed on that day. *State v. Ryan*, 113-536.

CHAPTER 8.

OF THE CLERK OF THE DISTRICT COURT.

**SECTION 287. Office—duties.**

[For earlier annotations, see code, page 177.—Ed.]

While it may be that the clerk of the court cannot be properly appointed receiver because as clerk he would be required to pass upon the sufficiency of the bond to be given by him as receiver, yet this objection cannot be raised by way of collateral

attack in an action brought by him as receiver to collect indebtedness. His actions as receiver may be valid *de facto* although his appointment is erroneous. *Metropolitan Nat. Bank v. Commercial State Bank*, 104-682.

**SEC. 288. Records—books to be kept.**

[For earlier annotations, see code, pages 177-181.—Ed.]

**What constitutes the record.** An original decree, signed by the judge before it is entered in the proper record is not a judgment. *McGlasson v. Scott*, 112-289.

The record book is the best evidence of a judgment, and it, or a certain transcript thereof, is alone admissible to show the judgment where there is no reason for introducing secondary evidence. *Baxter v. Pritchard*, 113-422.

Depositions, when filed, become a part of the records of the court, even though not used as evidence on the trial or the case in which they are taken, and if removed from the files without leave of court by the party filing them they may be required to be returned. *Howes v. Mutual Reserve Fund L. Assn.*, 88 N. W. 338.

A record showing the dismissal of an action made without authority will not prevent the action being notice to purchasers of property affected thereby after the case is noticed for trial. *Furry v. Ferguson*, 105-231.

The record is the only proof of a judgment. It cannot be established by entries in the judge's calendar, or a form for the entry of judgment signed by the judge. *Callanan v. Votruba*, 104-672; *King v. Dickson*, 114-160.

Whether a transcript of evidence on a previous trial is admissible under a stipulation, is to be determined by the court, and it may take judicial notice of the

record in the case and of the stipulation thereby shown. The record and stipulation need not be formally proved. *State v. Olds*, 106-110.

**Entries nunc pro tunc.** While a court may order a correction of its record of a prior date to conform to the facts as they existed at that date it cannot by such order change its records so as to show that a fact existed on a prior date that did not then in truth exist. *First Nat. Bank v. Redhead*, 103-421.

Therefore held that failure to file a certificate of the evidence in an equity case within six months after the trial could not be cured by a *nunc pro tunc* order making such certificate of record of a date prior to the date of its actual filing. *Ibid.*

Where a decree was prepared and signed by the judge and given to the clerk who filed but failed to record it, *held*, that it might subsequently be made of record by a *nunc pro tunc* order as of the date when it should have been recorded. *Day v. Goodwin*, 104-374.

While courts possess the power to enter judgments *nunc pro tunc* yet the exercise of such power presupposes the actual rendition of a judgment; the mere right to a judgment which never was rendered will not furnish the basis for such an entry. *Doughty v. Meek*, 105-16; *Graham Paper Co. v. Wahlwend*, 89 N. W., 1068.

But a court may enter judgment *nunc*

*pro tunc* on a confession of judgment where the clerk has failed to enter judgment thereon. *Doughty v. Meek*, 105-16.

Where upon the death of plaintiff in an action an order to substitute his administrator was made but judgment was entered in the name of the deceased plaintiff, *held*, that the defect in the judgment and in proceedings thereunder might be cured by a *nunc pro tunc* entry correcting

the judgment so as to show that it was in fact entered in favor of the substituted plaintiff. *Hunt v. Johnston*, 105-311.

An order *nunc pro tunc* will be made to avoid the effects of a delay by the court or of a delay or omission of its clerk, but rarely, if ever, to remedy a delay or omission due to a party or his attorney. *Newbury v. Getchell & Martin Lumber etc. Co.*, 106-140.

**SEC. 296. Fees to be collected and paid to county—when payable by county.** The clerk of the district court shall be entitled to charge and receive the following fees:

1. For filing any petition, appeal or writ of error and docketing the same, one dollar and fifty cents;
2. For every attachment, fifty cents;
3. For every cause tried by jury, one dollar and fifty cents;
4. For every cause tried by the court, seventy-five cents;
5. For every equity case, one dollar and fifty cents;
6. For each injunction or other extraordinary process or order, one dollar.
7. For all causes continued on application of a party by affidavit, fifty cents;
8. For all other continuances, fifteen cents;
9. For entering any final judgment or decree, seventy-five cents;
10. For taxing costs, fifty cents;
11. For issuing execution or other process after judgment or decree, fifty cents;
12. For filing and properly entering and indorsing each mechanic's lien, one dollar, and in case a suit is brought thereon, the same to be taxed as other costs in the action;
13. For certificate and seal, fifty cents;
14. For filing and docketing transcript of judgment from another county or a justice of the peace, fifty cents;
15. For entering any rule or order, twenty-five cents;
16. For issuing writ or order, not including subpoenas, fifty cents;
17. For issuing commission to take depositions, fifty cents;
18. For entering sheriff's sale of real estate, fifty cents;
19. For entering judgment by confession, one dollar;
20. For entering satisfaction of any judgment, twenty-five cents;
21. For all copies of record, or papers filed in his office, transcripts, and making complete record, ten cents for each hundred words;
22. For taking and approving a bond and sureties thereon, fifty cents;
23. For declaration of intention by an alien to become a citizen, twenty-five cents;
24. For all services on naturalization of aliens, including oaths and certificates, fifty cents.
25. For certificates and seal to applications to procure pensions, bounties or back pay for soldiers or other persons entitled thereto, ten cents;
26. For making out transcripts in criminal cases appealed to the supreme court, when the defendant is unable to pay, for each one hundred words, ten cents, to be paid by the county;
27. In criminal cases, and in all causes in which the state or county is a party plaintiff, the same fees for same services as in suits between private parties. When judgment is rendered against the defendant, the fees shall be collected from such defendant. Where the state fails, the clerk's fees shall be paid by the county.

In addition to the foregoing, he shall charge and collect:

28. For issuing marriage licenses, one dollar each;

29. For all services performed in the settlement of the estate of any decedent, except where actions are brought by the administrator or against him, or as may be otherwise provided herein, where the value of the estate does not exceed three thousand dollars, three dollars; where such value is between three and five thousand dollars, five dollars; where such value is between five and seven thousand dollars, eight dollars; where the value exceeds seven thousand dollars, ten dollars;

30. In addition to the foregoing, for making a complete record in cases where the same is required by law or directed by an order of the court, for every one hundred words, ten cents.

All of which fees shall be paid into the county treasury. [C. '73, §§ 3781-2, 3787; R., §§ 430, 436, 1852, 4136, 4140-1; C. '51, §§ 2531-2.] [29 G. A., ch. 17, § 1.]

**SEC. 298. Deputies—appointment—compensation—qualification.** The clerk, with the consent of the board of supervisors, may, when necessary, appoint a deputy, or employ a clerk or clerks, who shall not be a county officer. A certificate of such appointment and of the revocation thereof, when made, shall be filed with the county auditor. In counties of twenty thousand population or less, such deputy or clerk shall receive a salary not to exceed one-half the sum allowed to the principal. In counties having a population above twenty thousand and not exceeding thirty-five thousand, one or more deputies or clerks may be employed, their total compensation not to exceed fifteen hundred dollars, except that, where court is held at two places in a county, it may be any sum not exceeding two thousand dollars. In counties having a population of thirty-five thousand and less than forty thousand, one or more deputies may be employed, their total compensation not to exceed the sum of two thousand dollars. And in counties having a population exceeding forty thousand, one or more deputies or clerks may be employed, whose total compensation shall not exceed five thousand dollars. The compensation of such deputy or clerk shall be fixed by the board of supervisors at the time of the consent to the appointment. The deputy shall take the same oath as his principal, to be indorsed on the certificate of his appointment, and may perform the duties of his principal. Clerks' and deputies' salaries to be paid out of the county treasury in equal monthly installments. [22 G. A., ch. 36, §§ 1, 2; 18 G. A., ch. 184, § 1; C. '73, §§ 766-8, 770, 3784; R., §§ 644-5; C. '51, §§ 411-14, 416.] [27 G. A., ch. 12, § 1.]

[For annotations, see code, page 185.—ED.]

## CHAPTER 9.

### OF COUNTY ATTORNEYS AND THEIR DUTIES.

#### SECTION 301. Duties.

[For earlier annotations, see code, page 186.—Ed.]

The county attorney cannot be called upon to perform any duty save such as may be enjoined upon him by law. He is not required to follow a case into another county on change of venue. *Bevington v. Woodbury County*, 107-424.

sation for services to be rendered in a case in another county is valid. *Ibid.*

It is within the duties of the county attorney to take an appeal and give notice thereof in a criminal case. *State v. Grim-mell*, 88 N. W., 342.

Therefore a contract for extra compen-

#### SEC. 303. Deputies—assistance.

[For earlier annotations, see code, pages 186-7.—ED.]

The provision of Code § 5372, that the opening and closing arguments are to be made by the county attorney does not prevent such arguments being made by an attorney hired by private prosecutors to assist the county attorney. *State v. Novak*, 109-717.

**SEC. 303-a. Repeal—assistant—deputies—compensation.** That section three hundred and three (303) of the code be and the same is hereby repealed and the following enacted in lieu thereof. In counties having a population of thirty-six thousand (36,000) or more, the county attorney thereof, with the approval of the board of supervisors, may appoint a practicing attorney who is a resident of his county, as his assistant, whose salary shall be fixed at a reasonable figure by the board of supervisors at the time of his appointment and approval, but not to exceed ten hundred dollars (\$1,000.00) per annum. In counties of less than thirty-six thousand (36,000) he may appoint deputies who shall act without any compensation from the county, to assist him in the discharge of his duties. In any county with the approval of the district court, he may procure such assistance in the trial of a person charged with a felony as he shall deem necessary and such assistant, upon presenting to the board of supervisors a certificate of the district judge before whom said cause was tried, certifying to the service rendered, shall be allowed a reasonable compensation therefor, to be fixed by the board of supervisors; but nothing in this section shall prevent the board of supervisors from employing an attorney to assist the county attorney in any cause or proceeding in which the state or county is interested. [29 G. A., ch. 18, § 1.]

**SEC. 305. Prohibitions.**

[For earlier annotations, see code, page 187.—Ed.]

Where objection is not made during the trial to the appearance for the state of an attorney interested in a civil suit involving the same matter, such objection cannot be made for the first time in a motion for a new trial. By failing to object to the appearance of such attorney within a reasonable time after defendant is informed of his relations in the civil suit he waives all right of objection. *State v. Smith*, 108-440

A county attorney in whose term a person is indicted for illegal sale of intoxicating liquors, is not prohibited from being an attorney for the wife in her action against such person for sales of liquor to her husband, such sales not being connected with the sales for which the indictment was procured. *Bellison v. Ap-land*, 89 N. W., 22.

**SEC. 308. Compensation.** County attorneys shall be allowed an annual salary to be fixed by the board of supervisors of their respective counties at any regular or special session of said board, and in case said board has failed or may hereafter fail or neglect to fix said salary, then the compensation as last fixed shall continue until changed by the board at a regular or special session thereof; in counties having a population of five thousand or less, not to exceed five hundred dollars; in counties over five and under ten thousand, not to exceed six hundred dollars; in counties over ten and under fifteen thousand, not to exceed seven hundred and fifty dollars; in counties over fifteen and under twenty thousand, not exceeding nine hundred dollars; in counties over twenty and under thirty thousand, not to exceed one thousand dollars; and in all counties of thirty thousand or more, not to exceed fifteen hundred dollars, except that, where the court is held at two places in a county, it may be any sum not exceeding two thousand dollars; but in no county shall it be less than five hundred dollars. Said salary shall be paid quarterly out of the general fund of the county, and shall be due at the end of each quarter, namely: March thirty-first, June thirtieth, September thirtieth, and December thirty-first. In addition to the salary above provided, he shall receive the fees as now allowed to attorneys for suits upon written instruments where judgment is obtained, for all fines collected and school fund mortgages foreclosed, and his necessary and actual expenses incurred in attending upon his official duties at a place other than his residence and the county seat, which shall be audited and allowed by the board of supervisors of the county. [21 G. A., ch. 73, § 11.] [29 G. A., ch. 18, § 2.]

[For earlier annotations, see code, page 188 —Ed.]

The board of supervisors may contract to pay extra compensation for following a case into another county on change of venue. *Bevington v. Woodbury County*, 107-424.

## CHAPTER 10.

## OF ATTORNEYS AND COUNSELORS.

**SECTION 310. Qualifications.** Every applicant for such admission must be at least twenty-one years of age, of good moral character, and an inhabitant of this state, and must have actually and in good faith pursued a regular course of study of the law for at least three full years, either in the office of a member of the bar in regular practice of this state or other state, or of a judge of a court of record thereof, or in some reputable law school in the United States, or partly in such office and partly in such law school; but, in reckoning such period of study, the school year of any such law school, consisting of not less than thirty-six weeks exclusive of vacations, shall be considered equivalent to a full year. Every such applicant for admission must also have actually and in good faith acquired a general education substantially equivalent to that involved in the completion of a high-school course of study of at least three years in extent. [20 G. A., ch. 168, § 2.] [28 G. A., ch. 11, § 1.]

**SEC. 311. Examinations.** Every such applicant shall also be examined by the court, or by a commission of not less than five members constituted as hereinafter provided, as to his learning and skill in the law; and the court must be satisfied, before admitting to practice, that the applicant has actually and in good faith devoted the time hereinbefore required to the study of law, and possesses the requisite learning and skill therein, and has also the general education required by this act. The sufficiency of the general education of the applicant may be determined by examination before the commission, or in such other manner as the supreme court may by rule prescribe. [Same, § 3.] [28 G. A., ch. 11, § 2.]

**SEC. 311-a. Commission—how constituted—term—oath—compensation—temporary examiners.** The attorney-general shall, by virtue of his office, be a member of, and the chairman of, the commission provided for by the chapter of the code above referred to as amended by this act, and the court shall appoint from the members of the bar of this state at least four other persons who, with the attorney-general, shall constitute said commission, which shall be known as the board of law examiners. Of the persons first appointed as commissioners two shall be designated by the court to serve for one year; the remaining members shall serve for two years; and thereafter each person appointed shall serve for two years, except that in case of a vacancy during the term of office of any commissioner his successor shall be appointed only for the remainder of such term. The members thus appointed shall take and subscribe an oath to be administered by one of the judges of the supreme court to faithfully and impartially discharge the duties of the office, and shall receive such compensation as may be allowed by the supreme court out of the fund arising from the examination fees hereinafter provided for. The supreme court may also appoint, from time to time, when necessary, temporary examiners to assist the commission, who shall serve for one examination only, and shall receive such compensation as the court may allow, to be paid from the fund aforesaid. [28 G. A., ch. 11, § 5.]

**SEC. 311-b. Fees—how used.** Each applicant for admission shall pay to the clerk of the supreme court an examination fee of five dollars, payable before the examination is commenced. The fees thus paid to said clerk shall be retained by him as a special fund to be appropriated as provided for in the preceding section, and for other expenses incident to the examinations provided for in this chapter; and any amount thereof remaining in his hands unappropriated on the thirtieth day of June shall be turned over to the state treasury. [28 G. A., ch. 11, § 6.]

**SEC. 311-c. Acts in conflict repealed.** All acts or parts of acts in conflict with the provisions of this act are hereby repealed. [28 G. A., ch. 11, § 8.]

**SEC. 312. Of students in law department of university.** Students in the law department of the state university, who are recommended by the faculty of said department as candidates for graduation and as persons of good moral character, who have actually and in good faith studied law for the time and in the manner required by statute, at least one year of such study having been as a student in said department, may be examined at the university by not less than three members of said commission with the addition of such temporary members as may be appointed by the court in accordance with the provisions of this act, and upon the certificate of such examiners, that such candidates possess the learning and skill requisite for the practice of law, they shall be admitted without further examination. [20 G. A., 168, § 4.] [28 G. A., ch. 11, § 3.]

**SEC. 315. Mode of examination.** The supreme court may by general rules prescribe the mode in which examinations under this chapter shall be conducted, and in which the qualifications required as to age, residence, character, general education and term of study shall be proved, and may make any other and further rules, not inconsistent with this chapter, for the purpose of carrying out its object and intent. [Same, § 7.] [28 G. A., ch. 11, § 4.]

**SEC. 316. Attorneys resident in other states—must appoint local attorney.** Any member of the bar of another state, actually engaged in any cause or matter pending in any court of this state, may be permitted by such court to appear in and conduct such cause or matter while retaining his residence in another state, without being subject to the foregoing provisions of this chapter. Provided that at the time he enters his appearance he files with the clerk of such court the written appointment of some attorney resident in the county where such suit is pending, upon whom service may be had in all matters connected with said action, with the same effect as if personally made on such foreign attorney within such county. In case of failure to make such appointment, such attorney shall not be permitted to practice as aforesaid, and all papers filed by him shall be stricken from the files. Same, § 8.] [28 G. A., ch. 12, § 1.]

**SEC. 317. Duties of attorneys and counselors.**

[For earlier annotations, see code, pages 190-3.—Ed.]

**Duties and liabilities.** It is within the scope of authority of an attorney to make an agreement as to the record in the case. *American Emigrant Co. v. Long*, 105-194.

Under Code § 3851 an attorney is not competent as a surety on a bond for appeal from a justice of the peace. *Hudson v. Smith*, 111-411.

The relations between attorney and client require the utmost fairness and good faith on the part of the attorney, and the burden of proving the entire fairness of the transactions between them rests upon the attorney. A contract between attorney and client with reference to the property of the client is presumed to be fraudulent. *Shropshire v. Ryan*, 112-677.

It is not negligence on the part of an attorney to decline to proceed further in a case, and such refusal will not render him liable in damages for a subsequent adverse result therein. *Cullison v. Lindsay*, 108-124.

In an action to recover on account of the negligence of an attorney in defending an action it is not sufficient to show the negligence of the attorney and the fact

that judgment was recovered in the action. The plaintiff must go further in establishing that he has suffered damage by reason of such negligence. *Getchell & Martin Lumber etc. Co. v. Employers Liability Assur. Co.*, 90 N. W., 616.

Where an attorney received money from his client to be applied to a specific purpose, held, that he could not lawfully enter into an agreement for the appropriation of the money when received for the benefit of another to whom he owed no duty. *Farrar v. Farrar*, 104-621.

**Compensation.** The importance of the litigation, the success attained, and the benefit which it had secured may be considered in estimating the compensation to which the attorney who conducted it is entitled for the services he rendered. *Clark v. Ellsworth*, 104-442.

Where the subject matter of the litigation is of great importance to the litigants, and of a character to lead them to use every legitimate effort to succeed, the wealth of the party and his consequent ability to make a severe contest may be considered in connection with his disposition to do so as tending to show the im-

portance and value of services which the attorney for whose compensation he was responsible was required to render. *Ibid.*

Not only the amount and character of the services and the results attained but also the professional ability and standing of the attorney, his learning, skill and proficiency in his profession and his experience may be considered in estimating the reasonable value of his services. *Ibid.*

In an action to recover compensation for services wherein the attorney had testified to the amount of time spent out of court in preparing for trial of the case, held, that evidence that the time thus testified to as having been spent was an unreasonable time for the preparation of the trial of the case was admissible. *Ibid.*

The attorney is entitled to recover from the person who is liable for the services rendered by him any advances which he has made which were reasonably necessary in procuring information upon which to act. Whether, if a non-resident of the county in which the case is tried, he is entitled to recover for hotel bills and other expenses depends upon the usage in the locality, but he is not entitled to expenses of traveling outside the county where it does not appear that the services

of competent attorneys in the county could not have been procured. *Ibid.*

The wealth of the client cannot be taken into consideration in fixing the value of legal services. *Ibid.*

A contract by an attorney for contingent fee consisting of a certain proportion of the amount of recovery in the case, but not requiring of him the payment of any portion of the costs, is not unlawful. *Dunham v. Beniley*, 103-136.

A contract for a contingent fee, consisting of a specific share of the recovery, is not void as champertous. *Rickel v. Chicago, R. I. & P. R. Co.*, 112-148.

The fact that an attorney makes advancements in the way of paying the filing fee, and for the attendance of witnesses, and for other necessary expenses incident to the preparation and trial of the case, does not make the contract between the attorney and client as to fees illegal and immoral. *Wallace v. Chicago, M. & St. P. R. Co.*, 112-565.

An attorney appointed by a court to prosecute a proceeding for the disbarment of another attorney is not entitled to compensation therefor from the county. Such services are to be rendered by him as a part of his professional duty. *Hyatt v. Hamilton County*, 90 N. W., 508.

#### SEC. 318. Deceit or collusion—punishment.

[For earlier annotations, see code, page 193.—Ed.]

The facts in a particular case held sufficient to justify disbarment of an attorney for making a false affidavit, although under an agreement with the party to whom

the affidavit was given that it should not be used in the state. It is not necessary under this section that a crime be committed. *State v. Howard*, 112-256.

#### SEC. 319. Authority of attorneys and counselors.

[For earlier annotations, see code, pages 193-6.—Ed.]

An attorney does not have implied authority to confess or consent to judgment against his client. *First Nat. Bk. v. Bourdelais*, 109-497.

An attorney under general employment has no authority to consent to judgment against his client, or waive any cause of action or defense in his case. *Kilmer v. Gallaher*, 112-583.

Attorneys cannot by agreement not reduced to writing nor entered on the rec-

ords of the court agree to the submission of a case for a decree to be entered in vacation. *Whitlock v. Wade*, 90 N. W., 587.

A party who has been represented by an unauthorized attorney should disavow and disaffirm his action promptly upon receiving knowledge thereof, and if he is made a party plaintiff with knowledge of the fact, he will be bound by the judgment if he does not disavow or disaffirm the action. *Oxtoby v. Henley*, 112-697.

#### SEC. 320. Proof of authority may be required.

[For earlier annotations, see code, pages 196-7.—Ed.]

This section points out the exclusive method of testing the authority of the attorney to appear in behalf of the client,

and the want of authority of the attorney cannot be raised by plea in abatement. *State v. Beardsley*, 108-396.

#### SEC. 321. Attorney's lien—notice.

[For earlier annotations, see code, pages 198-9.—Ed.]

The statute as to the lien of an attorney is a substantial enactment of the common law with the requirement concerning notice added. *Foss v. Cobbler*, 105-729.

A new contract as to fees, made after the filing of an attorney's lien, does not defeat the lien. *Wallace v. Chicago, M. & St. P. R. Co.*, 112-565.

Where an attorney's lien has been filed,

it makes no difference whether the money paid in settlement of the action is in fact paid before or after the dismissal of the action, if it appears that the payment was made in settlement of the claim and to prevent further litigation. *Ibid.*

This section makes no provision for a lien on real estate, and the attorney for a wife who sues for divorce and alimony,

and asks to have set aside an alleged fraudulent conveyance of land by her husband, cannot on the dismissal of the action

by the wife intervene for the purpose of having a lien in his favor enforced on such land. *Keehn v. Keehn*, 88 N. W., 957.

#### SEC. 322. How lien released.

[For earlier annotations, see code, page 199.—Ed.]

Where a suit is brought in equity to enforce an attorney's lien, the client is not entitled to have the action transferred to

the law docket on filing a bond, as authorized by this section. *Crissman v. McDuff*, 114-83.

#### SEC. 323. License to practice may be revoked.

[For earlier annotations, see code, page 200.—Ed.]

In a proceeding under this section, where the court fails to find the defendant guilty, it has no power, on dismissing the charges, to render judgment that the

defendant be reprimanded and tax costs to the defendant. *State v. Tracy*, 87 N. W., 727.

#### SEC. 324. Grounds for revocation.

[For earlier annotations, see code, page 200.—Ed.]

Judgment of disbarment should only be pronounced upon clear and convincing

proof. *State v. Howard*, 112-256.

**SEC. 325. Proceedings—how begun—costs—how paid.** The proceedings to remove or suspend an attorney may be commenced by the direction of the court or on motion of any individual. In the former case, the court must direct some attorney to draw up the accusation; in the latter, the accusation must be drawn up and sworn to by the person making it. If an action is commenced by direction of the court, the costs shall be taxed and disposed of as in criminal cases; provided, however, that no allowance shall be made in such case for the payment of attorney fees. [C. '73, § 219; R., § 2712; C. '51, § 1622.] [29 G. A., ch. 19, § 1.]

[For earlier annotations, see code, page 200.—ED.]

The court may properly appoint more than one attorney to take charge of the proceedings and draw up the proper accusation. *State v. Howard*, 112-256.

required to pay fees of attorneys appointed by the court to prosecute the proceeding. The attorney so appointed is bound to render services without compensation as a part of his professional duty. *Ibid.*

A proceeding to disbar an attorney is a special action as described in Code Sec. 3438 and is triable as an ordinary action. *Hyatt v. Hamilton County*, 90 N. W., 508.

The judge sitting as court may direct disbarment proceedings to be begun in the name of the state and appoint attorneys to prosecute the case, although his attention to the misconduct of the attorney has been called by an affidavit presented to him in vacation. *State v. Tracy*, 87 N. W., 727.

Such a proceeding is not adversary in character in such sense that there are antagonistic parties. While the proceeding may be entitled in the name of the state against the accused the county is not a party in such sense that it may be

#### SEC. 331. When not guilty.

[For earlier annotations, see code, page 201.—Ed.]

The client is not required to give bond for the discharge of the attorney's lien before proceeding by motion to compel the attorney to pay over the money. *Union*

*Edg. & Sav. Assn. v. Soderquist*, 87 N. W., 433.

Further as to compelling attorneys on motion to pay over money of the client, see notes to § 326.

## CHAPTER 11.

### OF JURORS.

**SECTION 337. Judges of election to return names—if they fail, supervisors supply names.** The auditor shall, at the time of furnishing the poll-books to the judges of election, furnish them also a statement of the number of persons apportioned to their respective precincts to be returned for each of the said jury lists, together with the names of all persons who

have served as grand or petit jurors since January first preceding, which latter names shall be furnished to him by the clerk of the district court. The judges shall thereupon make the requisite selection, and return lists of names so selected to the auditor with the returns of elections; and in case the judges of election shall fail to make and return said lists as herein required, the board of supervisors shall, at the meeting held to canvass the votes polled in the county, make such lists for the delinquent precincts, and the auditor shall file such lists in his office, and cause a copy thereof to be recorded in the election book. Should no general election be held in the year one thousand nine hundred and five, the board of supervisors shall meet on the first Monday in December of said year and prepare the grand and petit jury lists from the poll books returned from the various voting precincts of the county in the year one thousand nine hundred and four. Such lists shall be composed only of persons competent and qualified to serve as jurors; and the judges of election or boards of supervisors shall omit from said lists the name of any person who has served as a grand or petit juror in a court of record since January first preceding. And if the name of any such person is returned, the fact that he has requested to be so returned, or has served as such juror in a court of record during the jury year, as defined in this chapter, shall be a ground for challenge for cause. The members of the election board, or the board of supervisors, when certifying to such lists, shall state that the lists do not contain the name of any person who requested, directly or indirectly, that his name appear thereon. If the boundaries of any voting precinct shall be changed, it shall be the duty of the auditor, in making the apportionment of grand and petit jurors and talesmen, to assign to the new voting precincts the total number of grand and petit jurors and talesmen to which all the former precincts affected by the change were entitled, giving to each new precinct an equal number, as nearly as possible. [26 G. A., ch. 61, § 6; C. '73, § 238; R., §§ 2727-8; C. '51, §§ 1637-8.] [29 G. A., ch. 20, § 1.]

[For earlier annotations, see code, page 203.—Ed.]

Objections to a juror because he was the officer at the election required to return names of jurors, and requested a return of his own name, cannot be made after the examination of the jurors, although the fact is not known until after verdict. *In re Goldthorp's Estate*, 88 N. W., 944.

The act relating to selection of grand jurors which took effect July 1, 1895, did not render illegal grand juries which had already been selected for the year under the old law. *State v. Wiltsey*, 103-54.

### SEC. 339. Grand jurors—panel of twelve for each year.

[For earlier annotations, see code, page 203.—Ed.]

The objection that two members of the grand jury were residents of the same township will be waived if not urged before pleading to the indictment, unless it appears that defendant did not know of the irregularity before pleading. *State v. Kouhns*, 103-720.

**SEC. 340-a. Repeal.** That section three hundred and forty of the code be, and the same is, hereby repealed. [27 G. A., ch. 114, § 3.]

[For present law, see sections 5240 and 5246, *infra*.—Ed.]

### SEC. 342. When, how and by whom drawn.

[For earlier annotations, see code, page 204.—Ed.]

In a county having two county seats, the county recorder discharging the duties of his office at one county seat, and his deputy at the other, held that the deputy might act in the drawing of jurors at the latter county seat. *State v. Turner*, 114-426.

### SEC. 348. Court controls numbers.

[For earlier annotations, see code, page 206.—Ed.]

Where the jurors are excused for the time when their services are not needed, they are not entitled to compensation for such time. *Venett v. Jordan*, 111-409.

**SEC. 349. Talesmen—when and how drawn—waiver.**

The statute requires the drawing to be in the presence of the court, and it will be presumed, unless otherwise shown by bill of exceptions (and not by affidavits), that the statutory direction was followed. *Moss v. Appanoose County*, 109-671.

While the statute authorizes the court to direct the clerk in calling talesmen to omit names of any whom he knows to be exempt from jury service, and does not authorize a direction to omit names of those known to be unable to serve, yet such misdirection will not constitute error in the trial of a case, where it appears that the complaining party did not exhaust his challenges, and that the jurors before

whom the case was tried were legally qualified to sit, and that no exception to any member of the jury; nor to the jury as a whole, was taken. *State v. McIntosh*, 109-209.

It is not necessary to call talesmen in the order in which their names are drawn from the box. It is not objectionable to draw a sufficient number of talesmen all at once to meet the requirements of a particular case. *State v. Minor*, 106-642.

Where the names of the talesmen are drawn from the proper box they may be used as they appear without their names being again drawn. *State v. Wolf*, 112-458.

**SEC. 354. Fees for jurors.**

[For earlier annotations, see code, page 207.—Ed.]

Where the jurors are excused for a time, as provided in Code § 348, they are not entitled to compensation for such time. *Venett v. Jordan*. 111-409.

## CHAPTER 12.

## OF SECURITIES AND INVESTMENTS.

**SECTION. 357. Defects rectified.**

[For earlier annotations, see code, page 207.—Ed.]

The amendment of an affidavit will not be effectual to cure an error against a party who has already acquired rights. *McGillivray v. Case*, 107-17.

**SEC. 370. Administrator, trustee, etc., may deposit with clerk—effect.** Whenever any administrator, guardian, trustee or referee shall desire to make his final report, and shall then have in his possession or under his control any funds, moneys or securities due, or to become due, to any heir, legatee, devisee or other person, whose place of residence is unknown to such administrator, guardian, trustee, or referee or to whom payment of the amount due cannot be made as shown by the report on file, such funds, moneys or securities may upon order of the court and after such notice as the court may prescribe, be deposited with the clerk of the district court of the county wherein such appointment was made, and, if he shall otherwise discharge all the duties imposed upon him by such appointment, he may take the receipt of the clerk of the district court for such funds, moneys or securities so deposited, which receipt shall specifically set forth from whom said funds, moneys or securities were derived, the amount thereof, and the name of the person to whom due or to become due, if known. Thereupon said administrator, guardian, trustee or referee may file such receipt with his final report, and, if it shall be made to appear to the satisfaction of the court that he has in all other respects complied with the law governing his appointment and duties, the court may approve such final report and enter his discharge; but notice of such contemplated deposit, and of final report, shall be given for the same time and in the same manner as is now required in cases of final report by administrators. [22 G. A., ch. 41, § 1.] [28 G. A., ch. 13, § 1.]

**SEC. 371. Duty and liability of clerk as to deposits.** The clerk of the district court with whom any deposit of funds, moneys or securities shall be made, as provided by any law or an order of court, shall enter in a book, to be provided and kept for that purpose, the amount of such deposit, the character thereof, the date of its deposit, from whom received, from what

source derived, to whom due or to become due, if known. He shall be liable upon his bond for all such funds, moneys or securities which may be deposited with him, and shall make complete verified statements thereof to the board of supervisors at the January and June sessions each year. If the funds, moneys or securities so deposited with the clerk shall not be paid to the person or persons to whom the same is due, or to become due, within six months from the date of its deposit, the clerk shall then, unless otherwise ordered by the court or judge, deposit such funds, moneys or securities with the county treasurer for the use of the county wherein such appointment was made, taking the treasurer's receipt therefor, countersigned by the county auditor, who shall thereupon charge upon the books of his office and against the treasurer the amount named in such receipts. [Same, § 2.] [28 G. A., ch. 14, § 1.]

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### CHAPTER 13.

#### OF NOTARIES PUBLIC.

#### SECTION 373. Appointment—commissions expire—notice.

[For earlier annotations, see code, page 211.—Ed.]

A notary public acting for a bank which holds a draft for collection, in presenting the draft is not the mere agent of the bank, but is a public officer for whose negligence the bank will not be liable. It makes no difference that the notary is also an employe of the bank. *First Nat. Bank v. German Bank*, 107-543.

#### SEC. 378. Record to be kept.

The requirement as to keeping a record of notices sent is for the purpose of perpetuating proof of the notice, as well as of the demand and protest. *First Nat. Bank v. German Bank*, 107-543.

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### CHAPTER 15.

#### OF THE ADMINISTRATION OF OATHS.

#### SECTION 393. Who may administer.

[For earlier annotations, see code, page 215.—Ed.]

The jurat to a statement for confession of judgment is sufficient if it show that such statement was subscribed and sworn to without reciting the name of the person subscribing and swearing to the jurat. It will be presumed that it was sworn to

by the person whose name is affixed thereto. *Briggs v. Yetzer*, 103-342.

An affidavit is a written declaration under oath signed by the affiant, and where the declaration is not signed a jurat showing that it is sworn to is not sufficient. *Dyer v. Des Moines Ins. Co.*, 103-524.

## TITLE IV.

### OF COUNTY AND TOWNSHIP GOVERNMENT.

#### CHAPTER 1.

##### OF COUNTIES.

**SECTION 395-a. Jurisdiction in border counties.** That the jurisdiction of the courts of the state of Iowa, in counties bordering on the Missouri river, in all civil and criminal actions and proceedings, is hereby declared to extend to the center of the main channel of the Missouri river, where the same now is or may hereafter be, and to all lands and territory lying along said river, which have been adjudged by the United States supreme court or the supreme court of this state to be within the state of Iowa, and to such other lands and territory along said river over which the courts of this state have heretofore exercised jurisdiction. [27 G. A., ch. 14, § 1.]

**SEC. 396. Relocation of county seat.**

Cannot change location of court house without submitting question to vote. *Way v. Fox*, 109-340.

**SEC. 407. Redemption—notice—interest stopped.** Whenever the amount in the hands of the treasurer belonging to the bond fund, after setting aside the sum required to pay interest maturing before the next levy, is sufficient to redeem one or more bonds, which by their terms are subject to redemption, he shall notify the owner of such bond or bonds, in the manner hereinbefore prescribed, that he is prepared to pay the same, with all the interest accrued thereon. If not presented for payment or redemption within thirty days after the date of such notice, the interest on such bond shall cease, and the amount due thereon shall be set aside for its payment whenever presented. All redemptions shall be made in the order of their numbers. [17 G. A., ch. 58, § 4; C. '73, § 292.] [27 G. A., ch. 15, § 1.]

#### CHAPTER 2.

##### OF THE BOARD OF SUPERVISORS.

**SECTION 420. Special meetings—how called—business done.**

[For earlier annotations, see code, page 223.—Ed.]

The canvassing of a statement of con- (Code § 2450) may be made at an ad-  
sent under the mulct liquor law, which journed meeting provided for at a regular  
is required to be at a regular meeting meeting. *Butterfield v. Treichler*, 113-328.

**SEC. 422. Powers specified.**

[For earlier annotations, see code, pages 224-31.—Ed.]

**Par. 9. Purchase of Real Estate.** The power to purchase real estate needed for the erection of buildings for county purposes carries with it as a necessary incident the power to create an indebtedness therefor, and to evidence the same by some form of non-negotiable instrument, but held that under the provisions of Code §§ 447, 448, the board had no authority to issue negotiable bonds for such indebtedness without compliance with the provisions of those sections. *Witter v. Board of Supervisors*, 112-380.

**Par. 11. General Powers.** The powers granted to or implied in a municipal or quasi corporation are only such as are necessary to make those expressly granted applicable; therefore it has no authority to execute a deed with covenants of warranty unless such authority is expressly given, and it will not be liable for breach of such a warranty. *Harrison v. Palo Alto County*, 104-383.

Nor will it be liable for failure of title to land conveyed by it at least where the

nature of its title was known to the grantee. *Ibid.*

The mere fact of making a conveyance of land the title of which subsequently fails will not constitute such fraud as to render the corporation liable. *Ibid.*

A county may be liable under implied contract for sand and gravel taken by its agents in the construction of the approach to a county bridge. *Ibid.*

**Par. 18. Liability as to Bridges.** Where the traveler had the option of crossing the stream under the bridge and incurring the risk of going up a steep bank in doing so or to go upon the bridge along the approach which was not guarded by a railing, held, that he was not guilty of contributory negligence in using the approach to the bridge, it not appearing that he had reason to anticipate any danger on the approach by reason of want of proper guarding rails. *Morgan v. Dallas County*, 103-57.

The contingency of horses becoming frightened on a bridge or the approach thereto and backing the vehicle to the side is one which should be foreseen and the danger thereof provided against by suitable barriers, and the county may be held liable for failure to provide a reasonable barrier as a protection against such danger. *Faulk v. Iowa County*, 103-442.

Where an accident happened by reason of the railing not being strong enough to resist the ordinary pressure from the backing of the vehicle under such circumstances, held, that the defective condition of the railing might be shown for the purpose of charging the county with notice. *Ibid.*

An approach to a bridge essential to enable persons on the highway to reach the main structure, and without which the main structure would be incomplete, constitutes a part of the bridge. *Eginoire v. Union County*, 112-558.

Although a horse being driven across an approach to the bridge becomes frightened by objects along the road, and gets beyond the control of the driver, yet, if the vehicle is thrown from the approach by reason of the want of proper railings, the county will be liable. *Ibid.*

When two causes combine to produce an injury to a traveler upon a bridge, both of which are in their nature proximate, the one being a culpable defect in the bridge and the other some occurrence for which neither is responsible, the municipality is liable, provided the injury would not have been sustained but for such defect. *Walrod v. Webster County*, 110-349.

#### **SEC. 423. Expenditures for improvements—when vote necessary.**

The board of supervisors shall not order the erection of a court-house, jail, poor-house or other building, or bridge, except as provided in section four hundred and twenty-four (424) of the code, when the probable cost will exceed five thousand dollars, nor the purchase of real estate for county purposes exceeding two thousand dollars in value, until a proposition therefor shall have been first submitted to the legal voters of the county, and voted for by a majority of all persons voting for and against such proposition at a general or special election, notice of the same being given for thirty days previously, in a newspaper, if one be published in the county, and, if none be published therein, then by written notice posted in a public place in each township in the county. [18 G. A., ch. 46; 16 G. A., ch. 80; C. '73, § 303; R., § 312.] [29 G. A., ch. 21, § 1.]

[For earlier annotations, see code, pages 231-2.—Ed.]

The limitation of the expense of erecting a court-house, without submission to vote, does not apply to expenditure of

money donated by private citizens. *Way v. Fox*, 109-340.

#### **SEC. 427. Highways established to avoid bridging.**

This section does not require that the road be constructed on the immediate bank of the stream, but a road within a reasonable distance of the stream is within its provisions. Nor does the statute con-

template the abandonment of the highway in place of which a new one is established under this section. *Stahr v. Carter*, 90 N. W., 64.

**SEC. 441. Official newspapers—how selected—what published in—compensation.** The board of supervisors of each county shall, at its January session in each year, select two newspapers published within the county, or one, if there be but one published therein, having the largest number of *bona fide* yearly subscribers within the county, which circulation shall be determined as follows: In case of contest, the applicants shall each

deposit with the county auditor, on or before a day named by the board of supervisors, a certified statement, subscribed and sworn to before some competent officer, giving the names of the several post-offices, and the number and the names of the *bona fide* yearly subscribers receiving their papers through each of said offices living within the county; such statements to be in sealed envelopes, and opened by the county auditor upon direction of the board of supervisors; and the two applicants thus showing the greatest number of *bona fide* yearly subscribers living within the county shall be the county official papers, in which all the proceedings of the county board of supervisors, the schedule of bills allowed, and the reports of the county treasurer, including a schedule of the receipts and expenditures, shall be published at the expense of the county during the ensuing year, and the costs of such publication shall be thirty-three and one-third cents for each ten lines of brevier type, or its equivalent; but in counties having a population of seventeen thousand or more, three papers, not more than two of which shall be published in the same town, shall be selected, in which such proceedings shall be published, with the same limitation as to compensation; and, in counties having two county seats, each district shall be regarded as a county for the purposes of such publication. The county auditor shall furnish all such papers selected a copy of such proceedings for that purpose. In case a contest is made by a publisher, the board shall receive other evidence of circulation, and he shall have the right of appeal to the district court, to be taken as in ordinary actions. Neither publisher to the contest shall receive pay for publishing such proceedings until the case is finally disposed of. [21 G. A., ch. 86, § 2; 20 G. A., ch. 197, § 2; C. '73, § 307.] [29 G. A., ch. 22, § 1.]

[For earlier annotations, see code, pages 236-7.—Ed.]

Where the board has authority, on account of the population of the county, to select a third paper, such third paper is to be selected in the same manner as the other two are selected. It is not intended that any two or more papers may combine their *bona fide* subscription lists and be selected by virtue thereof. *Packard v. Schmidt*, 110-628.

As to measurement for purpose of determining amount of compensation, see *Brown v. Lucas County*, 94-70.

The appeal is triable in the district court *de novo*, and the court should not approve the action of the board of supervisors unless the paper selected by the board makes such showing in the district court as entitles it to be selected. *Young v. Rann*, 111-253.

In determining who are yearly subscribers under the statute it is not necessary to show that such subscribers have already taken the paper for a year. *Ibid.*

The appeal must be taken within six months. *Ibid.*

#### SEC. 448. Rate of voted tax.

[For earlier annotations, see code, page 239.—Ed.]

Although the board of supervisors, under Code § 422, Par. 9, has power to create an indebtedness evidenced by non-negotiable instruments for the purchase of real estate necessary for the erection of buildings

for county purposes, it has not power to issue negotiable bonds therefor without compliance with the provisions of these sections. *Witter v. Board of Supervisors*, 112-380.

#### SEC. 451. Rescission by subsequent vote.

Although the statute embodied in this section was enacted before that embodied in Code § 423, authorizing the levying of a tax by popular vote for the erection of court-houses, both being now re-enacted

in the Code, are to be construed together, and a tax levied for such purpose may be rescinded by vote of the electors. *Windsor v. Polk County*, 87 N. W., 704.

#### SEC. 452. Board must submit questions on petition.

In a particular case held that the petition on which it was desired that the board should act had never been presented

to the board, and no action thereon was required. *Windsor v. Polk County*, 87 N. W., 704.

**SEC. 468-a. Contracts by supervisors and trustees prohibited.** Members of boards of supervisors and township trustees shall not buy from, sell to, or in any manner become parties directly, or indirectly, to any contract to furnish supplies, material, or labor to the county or township in which they are respectively members of such board of supervisors or township trustees. [27 G. A., ch. 13, § 1.]

### CHAPTER 3.

#### OF THE COUNTY AUDITOR.

**SECTION 480-a. Financial report—what to contain.** The county auditor shall during the month of January of each year, compile and prepare a financial report, which report shall contain a schedule showing the amount of the various classes of warrants drawn on the county fund, except for court expenses during the preceding year, including therein, among other items, the total amount paid each county officer also their deputies and extra help, also other employes of the county and amounts paid for rent and various other expenses, including printing and stationery, furniture and fixtures, publishing proceedings of the board of supervisors, postage allowed each county official, complete election expenses, including printing of ballots, expenses of registration and items of like nature; a schedule showing the amount of warrants drawn on the county fund for various court expenses, which shall include among other items the salary paid the county attorney and the amounts received by him as commission on fines and from other sources, and the amount paid to assistant counsel; also amount paid jurors in the district court, amount paid witnesses in the district court, amount paid bailiffs in district court, amount paid for short hand reporting, amount paid for printing and stationery, amount paid for attorney fees for defending criminals, amount paid for meals for jurors and items of like nature; a schedule showing the expenses of the grand jury, stating amounts paid grand jurors, bailiffs, witnesses and items of like nature; a schedule showing the expenses of the coroners court, stating amount paid coroner, coroner's clerk, constable fees, witness fees and items of [items of] like nature; a schedule showing the expenses of justice courts, stating amounts paid various justices, constables, total amount paid witnesses, jurors, attorney fees, for printing and items of like nature; a schedule showing the amount drawn by each member of the board of supervisors from the several funds of the county for services during the preceding year; a schedule, being a recapitulation of the total amount of warrants drawn on the county fund with a comparison with the amount of warrants drawn on the county fund each year for the last five years; a schedule showing the various classes of warrants drawn on the pauper fund for the preceding year, with a comparison with the total amount of warrants drawn on the pauper fund each year for the last five years; a schedule showing the amount of warrants drawn on the insane fund for the preceding year, including the amount received by each commissioner as fees and expenses, fees of witnesses, sheriff's fees and expenses, the cost of transportation and items of like nature; also total cost of maintenance of insane at county asylum, with number confined therein, and total paid the various state hospitals for the insane, with the number of patients from the county confined in such hospitals; a schedule showing the amount paid the various state institutions during the preceding year; a schedule showing the amounts paid the sheriff for boarding prisoners during the preceding year, together with the amount paid the sheriff as jail expenses, with a comparison with the amounts paid for boarding prisoners and for jail expenses each year

during the last five years; a schedule showing the amounts paid for the condemning of intoxicating liquors during the preceding year, also costs of convictions, both in justice courts and in the district court, for the violation of the laws relating to the sale of intoxicating liquors, together with the amount of fines collected for such violation and the amounts received as mulct tax, if any; a schedule showing the amount of warrants drawn on the county road fund and each of the various other funds of the county. Said financial report shall also contain the report of the county auditor as required by section four hundred and seventy-five (475) of the code, also the various reports of magistrates and other officers as required by section one thousand three hundred and two (1302) of the code, also the various reports made during the preceding year, by the county treasurer, county auditor, county recorder, sheriff, clerk of the district court and the soldiers relief commission, as required by law. It shall also contain the reports of the various committees that may be appointed by the board of supervisors to examine the affairs and accounts of the various county officials and employes. It shall also contain such other and further matters and information as the board of supervisors may direct or the county auditor may deem advisable. The comparison herein provided for shall not be required in the first report published; the second report need only contain a comparison with the preceding year, the third report with the last two years, the fourth report with the last three years and the fifth report with the last four years. [29 G. A., ch. 23, § 1.]

[The words *items* of enclosed in brackets appear in the enrolled bill, but would seem to have been a mere clerical error and surplusage.—Ed.]

**SEC. 480-b. Printing and distribution.** Said financial report shall be ordered printed by the board of supervisors in pamphlet form in such numbers as the board may direct, for distribution among the tax payers of the county. [29 G. A., ch. 23, § 2.]

## CHAPTER 4.

### OF THE COUNTY TREASURER.

**SECTION 483. As to warrants presented but not paid.** When a warrant drawn by the auditor on the treasurer is presented for payment, and not paid for want of money, the treasurer shall indorse thereon a note of that fact and the date of presentation, and sign it, and thenceforth it shall draw interest at the rate of five per cent. He shall keep a record of the number and amount of the warrants presented and indorsed for non-payment, which shall be paid in the order of such presentation. [21 G. A., ch. 84, § 1; C. '73, § 328; R., § 361; C. '51, § 153.] [29 G. A., ch. 24, § 1.]

[For annotations, see code, page 246.—Ed.]

**SEC. 484. Calls for outstanding warrants—interest stopped.**

The statute of limitations runs against a warrant without regard to whether it has been called by the treasurer for payment. *Bodman v. Johnson County*, 88 N. W., 331.

**SEC. 490. Compensation.** Each county treasurer shall receive for his services the following compensation:

1. Three-fourths of one per cent. of all money collected by him as taxes due any city or town, to be paid out of the same;
2. Three per cent. of all taxes collected by him for all other tax funds, to be paid out of the county treasury;
3. For each certificate of purchase issued for lands sold for non-payment of taxes, twenty cents;

4. For paying money into the state treasury, when required by law or the auditor of state, such compensation as the board of supervisors shall allow, not exceeding one-fourth of one per cent. on the amount so paid, which allowance shall be paid by the county;

5. When the aggregate amount of compensation allowed exceeds fifteen hundred dollars in any year, the excess shall be paid into the county treasury; but in counties where the population does not exceed ten thousand, the salary shall not exceed thirteen hundred dollars, and in such counties there shall not be allowed for deputy or clerk hire more than the amount provided in the next section. But in counties having a population of thirty thousand or over the board of supervisors may allow such additional compensation as it may deem proper. [18 G. A., ch. 184, § 2; 17 G. A., ch. 122, § 3; C. '73, § 3793; R., § 777.] [27 G. A., ch. 16, § 1.]

[For earlier annotations, see code, page 247.—Ed.]

Although a commission is allowed to the county treasurer for taxes collected, he has not such an interest in the taxes as to be disqualified to act under Code Sec. 1374 in collecting taxes on omitted property. His interest in the result is remote and incidental. *Beresheim v. Arnd*, 90 N. W., 506.

## CHAPTER 5.

### OF THE COUNTY RECORDER.

**SECTION 496. Deputies—qualification—compensation—other assistants.** Each county recorder may, in writing, with the consent of the board of supervisors, appoint any one not holding a county office his deputy, for whose acts he shall be responsible, and from whom he shall require bond, which bond shall be approved by the officer who has the approval of the principal's bond, and such appointment may be revoked in writing; which appointment and revocation shall be filed and kept in the auditor's office. The person thus appointed shall qualify by taking the same oath as his principal, indorsed upon the certificate of appointment. The deputy, in the absence or disability of his principal, may perform all the duties of the principal pertaining to his office, and shall receive a salary not exceeding nine hundred dollars a year, to be fixed by the board of supervisors. In counties where no deputy is appointed, or in counties having a population of thirty-five thousand (35,000) or over, the recorder may, with the approval of the board of supervisors, temporarily employ one or more assistants, when the pressure of business in his office renders it necessary, and he shall file a bill for such service at the next regular meeting of the board of supervisors, who shall make a reasonable allowance therefor. But the county shall not pay for such deputy service more than is received from the fees of said office, over and above the amount the recorder is allowed to retain. [25 G. A., ch. 76; 18 G. A., ch. 184, § 2; 17 G. A., ch. 122, § 3; 16 G. A., ch. 4; C. '73, §§ 766-8, 770-1; R., §§ 421,463-5, 467-8; C. '51, §§ 411, 414, 416, 417.] [29 G. A., ch. 25, § 1.]

## CHAPTER 6.

### OF THE SHERIFF.

**SECTION 508. Fees to be reported and paid to county.** Quarterly itemized reports under oath, upon blanks to be furnished by the county auditor, shall be made to the board of supervisors by the sheriff, of all fees and mileage charged or taxed, and all that are collected by him and his deputies,

including all sums for which the county is liable, except for dieting and lodging prisoners; and at the time of making such quarterly reports he shall make full settlement with said board, filing therewith the receipts of the county treasurer for all moneys paid over to him. [25 G. A., ch. 75, § 1.] [29 G. A., ch. 26, § 1.]

**SEC. 510-a. Repeal—compensation.** That section five hundred and nine (509) and section five hundred and ten (510) of the code be repealed and the following substituted therefor:

In counties having a population of over forty-five thousand the sheriff shall receive in full compensation for his services, except the expenses hereinafter provided for, thirty-five hundred dollars per annum, to be paid out of the receipts of the office. In counties having a population of over twenty-eight thousand and less than forty-five thousand the sheriff shall receive in full compensation for his services, except the expenses hereinafter provided for, three thousand dollars per annum, the same to be paid out of the receipts of the office. In counties having a population of over eleven thousand and less than twenty-eight thousand the sheriff shall receive in full compensation for his services, including the salary provided by section five hundred and eleven (511) of the code, the sum of two thousand dollars per annum, the same to be paid out of the receipts of the office. And any excess over the sums provided in all counties shall be paid into the county treasury annually. In all counties, the expenses necessarily incurred and actually paid while engaged in the performance of official duties in serving criminal process, or commitments to the penitentiaries, industrial schools or asylums, shall be allowed by the board of supervisors and paid as other claims against the county, and he shall be allowed to retain all mileage collected by him in the service of civil process. Provided, that in counties having a population of less than eleven thousand in which the receipts of the office, together with the salary allowed under section five hundred and eleven (511) of the code, do not amount to the sum of fifteen hundred dollars in any year, the board of supervisors shall, at the January session thereof, allow the sheriff a sum which added to the receipts of the office for the previous year will amount to the sum of fifteen hundred dollars and that in counties having a less population than twenty-eight thousand, in which the receipts of the office and salary allowed under section five hundred and eleven (511) of the code, do not amount to the sum of eighteen hundred dollars per annum, the board of supervisors shall, at the January session thereof following, make an allowance to the sheriff of a sum equal to the difference between the receipts of the office in the previous year, and eighteen hundred dollars. And in counties having a population of more than twenty-eight thousand and less than forty-five thousand, in which the receipts of the office and salary allowed by the board, do not in any year amount to the sum of two thousand dollars, the board of supervisors shall, at the January session thereof following, make an allowance to the sheriff of a sum equal to the difference between the receipts of the office for the previous year, and two thousand dollars. And in counties having a population of more than forty-five thousand in which the receipts of the office do not in any one year amount to the sum of thirty-five hundred dollars, the board of supervisors shall at the January session following make an allowance to the sheriff of a sum sufficient to make his salary equal to the sum of thirty-five hundred dollars. And provided further, that all fees earned and uncollected at the end of each year shall belong to the county, and when paid shall be by the clerk of the district court be reported to the board of supervisors and paid into the county treasury. [29 G. A., ch. 27, § 1.]

**SEC. 510-b. Deputies—qualification—compensation.** In all counties the sheriff shall in writing appoint one or more persons, not holding a county office, as deputy or deputies, for whose acts he shall be responsible and from

whom he shall require a bond, which appointment and bond shall be approved by the officer having the approval of the principal's bond; and such appointment may be revoked in writing, which appointment and revocation shall be filed and kept in the auditor's office. In all cases the board of supervisors shall fix the number of deputies and shall fix the salary of such deputies at not exceeding one thousand dollars per annum each in counties having a population of over twenty-eight thousand, and at not exceeding six hundred dollars per annum each in counties having a population of less than twenty-eight thousand; and in all counties the chief deputy shall be paid by the sheriff out of the compensation allowed him under the provisions of the preceding section, and all other deputies shall be paid by the county. [29 G. A., ch. 27, § 2.]

[For annotations, see code, page 251.—Ed.]

In a county where the district court is held at two places, and the county recorder is in the discharge of his office at one place, and his deputy at another, held that the deputy might act in drawing a jury. *State v. Turner*, 87 N. W., 287.

A bailiff employed at a monthly salary cannot properly draw compensation for fees earned by him when actually serving

in that capacity. *State v. Welsh*, 109-19. Under statutory provisions, which were superseded by the adoption of the Code, held that the sheriff in a county not containing twenty-eight thousand inhabitants, and who was not therefore a salaried officer, was nevertheless entitled to an allowance for a deputy. *Mentzer v. Marion County*, 114-478.

**SEC. 511. Fees to be collected.** Each sheriff is entitled to charge and receive the following fees:

1. For attending the supreme court, to be paid out of the amount appropriated for contingent expenses of said court, two dollars per day;
2. For serving a notice and making return thereof, for the first person served, fifty cents, and for each additional person, twenty-five cents;
3. For each warrant served, two dollars, and the repayment of any amount actually paid by him as necessary expenses in executing such warrant, as sworn to by the sheriff; if service of the warrant cannot be made, the repayment of all necessary expenses actually paid by the sheriff, while attempting in good faith to serve such warrant within this state, and such reasonable compensation as the board of supervisors may deem just and equitable;
4. For serving and returning a subpoena, for each person served, twenty cents;
5. For summoning a grand or trial jury, for each person served, sixty cents, to be paid out of the county treasury; and such sum shall be in full compensation for such service;
6. For summoning a jury to assess the damages to the owners of lands taken for public improvements, and attending them, five dollars per day. This paragraph shall not be so construed as to allow a sheriff to make separate charges for different assessments, which can be made by the same jury and completed in one day of ten hours;
7. For serving an execution, attachment, or order for the delivery of personal property, injunction, or any order of court, and making return thereof, two dollars;
8. For collecting and paying over money, on the first five hundred dollars or fraction thereof, two per cent.; on all in excess of five hundred dollars and under five thousand dollars, one per cent.; on all over five thousand dollars, one-half per cent.;
9. For making and executing a certificate or deed for lands sold on execution, or a bill of sale for personal property sold, one dollar;
10. For the time necessarily employed in making an inventory of personal property attached or levied upon, twenty-five cents per hour;
11. For a copy of any paper required by law, made by him, for each one hundred words, ten cents;

12. Mileage in all cases required by law, going and returning, five cents per mile;
13. For taking each bond required by law, twenty-five cents;
14. For each commitment to jail, twenty-five cents; discharge from same, twenty-five cents;
15. For receiving a prisoner on surrender by bail, fifty cents;
16. For boarding a prisoner, a compensation to be fixed by the board of supervisors, of not to exceed twelve and one-half cents for each meal, and not to exceed three meals in twenty-four consecutive hours; and not to exceed twelve and one-half cents for each night's lodging;
17. For waiting on and washing for prisoners, the sheriff shall have such reasonable compensation as shall be allowed by the board of supervisors;
18. For attending before any judge with a prisoner, one dollar per day;
19. For attending sale of property, for each day, one dollar;
20. For conveying one or more convicts to either of the penitentiaries of the state, or any prisoner to any county jail outside of the county in which said sheriff resides, or any insane person or persons to any insane asylum in the state, or person or persons to either of the industrial schools, he shall be allowed, as full compensation therefor, his necessary traveling expenses actually paid by him, including board and railroad fare for himself and such person or persons, or any other necessary expenses, and, in addition thereto, forty cents per hour for the time necessarily employed in going to and from said prisons, asylums, or schools, to be certified by the affidavit of such sheriff, accompanied by the proper vouchers, to the board of supervisors of the county from which the persons were committed. Should the sheriff need any assistance in taking prisoners to the penitentiary or insane persons to the asylum, the same shall be furnished at the expense of the county, the compensation to be fixed by the board of supervisors;
21. He shall be allowed for serving any warrant for the seizure of intoxicating liquors, one dollar; for the removal and custody of such liquor, actual and reasonable expenses; for the destruction of such liquor under the order of the court, his actual and reasonable expenses, and one dollar; for posting and leaving notices in such cases, one dollar;
22. The jailer may be furnished a dwelling in connection with the jail, or as convenient thereto as practicable, in the discretion of the board of supervisors;
23. The sheriff is also entitled, for attending the district court, and for other service for which no compensation is allowed by law, except in counties having a population of over twenty-eight thousand, an annual salary, which shall be fixed by the board of supervisors, but in no case less than two hundred dollars nor more than four hundred dollars. When sheriffs perform official duties in justices' courts, their fees shall be the same as allowed constables. [25 G. A., ch. 83; 23 G. A., ch. 41; 19 G. A., ch. 94, §§ 2-23; C. '73, § 3807; R., § 1570.] [27 G. A., ch. 17, §§ 1, 2.]

[For earlier annotations, see code, pages 253-4.—Ed.]

Where an order of court fixed the time when persons who had signed affidavits in support of an application for change of venue should appear for cross-examination, held, that service of subpoenas on such persons should not be taxed as the service of an order of court. *Spangler v. Beaver*, 106-744.

## CHAPTER 8.

## OF THE COUNTY SURVEYOR.

**SECTION 538. Record to be furnished—presumptive evidence.**

The survey, to be entitled to the presumption here contemplated, must have been made with the knowledge of the party sought to be bound, and recorded as here provided. *McAnich v. Hulse*, 113-58.

In a particular case held that even though the survey was admissible in evidence under this section there was sufficient evidence of its incorrectness to overcome the presumption in its favor. *Ibid.*

## CHAPTER 10.

## OF TOWNSHIPS AND TOWNSHIP OFFICERS.

**SECTION 576. Clerk to keep record.** The township clerk shall keep a record of all the proceedings and orders of the trustees, and of all acts done by him, including the filing of certificates of official oaths having been taken before other officers, and perform such other acts as may be required of him by law. It shall be the duty of each township clerk to receive, collect, preserve, and disburse, under the orders of the township trustees, all funds belonging to his township, including the cemetery fund, and those which are now or may hereafter be by law created or authorized. [C. '73, §§ 392, 395-6; R., §§ 445, 448-9; C. '51, §§ 223, 226-7.] [28 G. A., ch. 15, § 1.]

[For annotations, see code, page 264.—Ed.]

**SEC. 579. Constables—duties.**

[For earlier annotations, see code, page 264.—Ed.]

A writ of attachment from a district or constable. *Freeman v. Lind*, 112-39. superior court cannot be directed to a

**SEC. 586. Tax to pay for—adjoining townships.** They shall, at the regular meeting in April, levy a tax sufficient to pay for any such lands so condemned or purchased, or for the necessary improvement and maintenance of cemeteries thus established, or for the maintenance and improvement of cemeteries so established in adjoining townships in case they deem such action advisable. They shall have power to control any such cemeteries, or appoint trustees for the same, or sell them to any private corporation for cemetery purposes. [16 G. A., ch. 130, § 4.] [29 G. A., ch. 28, § 1.]

## TITLE V.

### OF CITY AND TOWN GOVERNMENT.

#### CHAPTER 1.

##### OF INCORPORATION.

###### SECTION 599. How effected.

[For earlier annotations, see code, page 269 —Ed ]

The petition is to be presented to the *ex rel. v. Council*, 106-731. district court and not to the judge. *State*

**SEC. 602. Notice of election of officers—council to elect assessor.** If a majority of the ballots cast at such election be in favor of the incorporation, and the same has been confirmed and approved as above provided, the court, or a judge thereof in vacation, shall order the election of a council, mayor, clerk and treasurer. The commissioners shall give notice for two consecutive weeks of the time and place of holding the election of councilmen and the aforesaid officers, by publication in a newspaper published in the county where the court is held, and by posting the same in five public places within the limits of such town, at which the qualified electors residing within such limits shall elect such councilmen and officers, who shall hold their offices until the first regular election thereafter. Said commissioners shall act as judges and clerks of the election, and shall have the same power and discharge the same duties as clerks in city or town elections, and such election shall be conducted, as far as practicable, in the manner prescribed by law for the election of town councilmen and officers. When the election of town officers as provided by this section shall be held on, or after, the date of the annual election for towns and prior to January first following, the council of said town so elected and confirmed by the court shall, at a regular meeting held prior to the first day of November following their election, elect an assessor for said town, who shall hold office for one year commencing on the first day of January next after his said election. The council shall elect the said assessor in the manner provided by subdivision nine (9) of section six hundred sixty-eight (668) of the code. [C. '73, §§ 423, 425.] [28 G. A., ch. 16, § 1.]

###### SEC. 614. Indebtedness—how paid.

The remedy of the holder of bonds issued by a city subsequently annexed to another, and which has ceased to have officers of its own, is by a suit in equity against the city to which the annexation is made,

which is to be deemed in equity a trustee for the creditor, charged with the duty of collecting the amount adjudged to be due him. *Burlington Sav. Bank v. Clinton*, 106 Fed., 269. And see S. C. 111 Fed., 439.

###### SEC. 616. Taxation of lands.

[For earlier annotations, see code, pages 274-5.—Ed.]

The mere temporary occupancy and use for agricultural purposes of annexed land will not prevent its being subject to municipal assessments. *Allen v. Davenport*, 107-90.

The exemption of agricultural lands, owned in tracts of ten acres, or more, from city taxes, does not apply to property which is used for city residence purposes. *Windsor v. Polk County*, 109-156.

**SEC. 622. Severance—application.**

[For earlier annotations, see code, pages 276-7.—Ed.]

This section does not require that the reasons for desiring a severance shall be stated, and it evidently is not intended that the ordinary rules of pleading shall apply in such cases. *Luick v. Belmont*, 109-361.

**SEC. 625. Trial commissioners appointed.**

[For earlier annotations, see code, page 277.—Ed.]

On an application to have territory detached from a city on the ground that the land included therein was not platted and was used exclusively for agricultural purposes and not needed for any possible increase of city population, held, that it did not sufficiently appear that the land was not needed for the city and that it would not be presumed that it would be taxed unreasonably, and the judgment of the court on a verdict of the jury that the territory should not be severed was sustained. *Christ v. Webster City*, 105-119.

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**CHAPTER 2.**
**OF ORGANIZATION AND OFFICERS.****SECTION 641. Wards.**

The city council has power to create new wards by ordinance but not by resolution. *Cascaden v. Waterloo*, 106-673.

**SEC. 645. Council—how composed.** City and town councils shall be composed as follows: In cities of the first class, two councilmen-at-large and one councilman from each ward; in cities of the second class, two councilmen from each ward; in towns, a mayor and six councilmen. [19 G. A., ch. 25; 18 G. A., ch. 120; 17 G. A., chs. 9, 14; C. '73, §§ 511, 521, 531; R., §§ 1081, 1093.] [29 G. A., ch. 29, § 2.]

**SEC. 652. Officers appointed by mayor.**

The marshal in towns, being an appointee of the mayor, a contract between the city council and a person to act as marshal at a stipulated salary is not valid. *Baxter v. Beacon*, 112-744.

**SEC. 654. Police matrons—appointment—number.** In cities having a population of twenty-five thousand or more, for each station-house provided therein for the detention or imprisonment of women or children under arrest, the mayor may, and in cities having a population of thirty-five thousand or over shall appoint one or more women, residents of the city, as police matrons, who shall be over thirty years of age. The appointees shall be, so far as applicable, subject to the same regulations and restrictions as policemen, and hold their positions during good behavior, unless by reason of age or infirmity they become incapacitated to perform the duties of the position. [25 G. A., ch. 15, §§ 2, 3, 5.] [27 G. A., ch. 18, § 1.]

A city may by ordinance provide for the appointment of a police matron, without regard to statutory authority, and may by contract fix her compensation at a different rate than that fixed by statute. *Daniels v. Des Moines*, 108-484.

**SEC. 658. Mayor—powers and duties.** In cities and towns, the mayor shall have powers and perform duties as follows:

1. *Executive officer—magistrate.* He shall be a conservator of the peace, and, within the limits of the same, shall have all the powers conferred upon sheriffs to suppress disorders. He shall be the chief executive officer thereof, and it shall be his duty to enforce all regulations and ordinances; he may, upon view, arrest any one guilty of a violation thereof, or of any crime under the laws of the state, and shall, upon information supported

by affidavit, issue process for the arrest of any person charged with violating any ordinance of the city; shall supervise the conduct of all corporate officers, examine into the grounds of complaint made against them, and cause all neglect or violation of duty to be corrected, or report the same to the proper tribunal, that they may be dealt with as provided by law. [C. '73, §§ 506, 519, 537; R., §§ 1085, 1091, 1102, 1105.]

[For annotations, see code, page 282.—Ed.]

2. *Office.* He shall keep an office at some convenient place in the city or town, to be provided by the council, and keep the corporate seal thereof in his charge. [16 G. A., ch. 58; C. '73, § 518; R., § 1091.]

*Office.* Where a city fails to furnish a proper office for its mayor he may furnish one and collect the actual and reasonable expense thereof from the city. *Hill v. Clarinda*, 103-409.

3. *Signature.* He shall sign all commissions, licenses and permits granted by the authority of the council, and do such other acts as by law or ordinance may require his signature or certificate. [16 G. A., ch. 58; C. '73, § 518; R., § 1091.]

4. *Other duties.* He shall also perform such other duties compatible with the nature of his office as the council may from time to time require. [C. '73, § 519; R., § 1091.]

5. *Presiding officer—vote.* In cities of the first class, he shall be the presiding officer of the council, with the right to vote only in case of a tie; in cities of the second class, he shall be the presiding officer of the council, with the right to vote only in case of a tie; in towns, he shall be a member of the council and presiding officer thereof, with the same right to vote as a councilman. [18 G. A., chs. 120, 146; 17 G. A., ch. 9; 16 G. A., ch. 58; C. '73, §§ 512, 518, 531; R., §§ 1082, 1091.] [29 G. A., ch. 29, § 1.]

[For earlier annotations, see code, page 283.—Ed.]

*Presiding officers—vote.* The mayor is the presiding officer of the city council when acting as a board of review for the equalizing of taxes. *Frost v. Board of Review*, 113-547.

The right of the mayor to a casting vote is limited to cases where there is in fact a tie. *State v. Alexander*, 107-177.

Under the Code of '73, the mayor of a city of the second class, being a member of the city council, though only voting in case of a tie, held, that he must be included with the council in determining whether a proposition was carried by a three-fourths vote. *Griffin v. Messenger*, 114-99.

6. *Report.* He shall, at the first regular meeting of the newly elected council in April, and at such other times as he may deem expedient, report to it concerning the municipal affairs of the city or town, and recommend such measures as to him may seem advisable. [C. '73, § 534; R., § 1105.]

7. *Hold police court.* Until a police judge or judge of superior court shall be elected and qualified in cities entitled to elect such officer, he shall have all the powers and jurisdiction and shall hold the police court in such manner as is required of such judge. [C. '73, § 547; R., § 1121.]

8. *Station-houses for women.* In all cities containing a population of twenty-five thousand or more, he shall designate one or more station-houses within such city for the detention or imprisonment of all women and children under arrest in said city, and see that provisions are made by which the rooms or cells set apart for them shall be separate from and out of sight of the rooms or cells in which male prisoners are imprisoned. [25 G. A., ch. 15, § 1.]

**SEC. 658-a. Legalizing certain proceedings.** That all acts, motions, proceedings, resolutions and ordinances heretofore passed or adopted by the council of any city, including cities acting under special charter, and incorporated towns in the state on the supposition that the mayor was not a member of such council, and which would conform to the law if the mayor had not been a member of said council, shall for all purposes from the date of such act, motion, proceeding, resolution or ordinance, be considered as

valid and legal as they would have been had the mayor not been a member of such body. [29 G. A., ch 224, § 1.]

#### SEC. 659. Clerk—duties.

The clerk is to keep an accurate record of proceedings under the supervision of the council, and the council, on hearing the record read by the clerk, may correct it. The council has the control of the record of its proceedings, and until such record is approved it is open to such modifications as may be necessary to truthfully exemplify what has been done. *Mann v. LeMars*, 109-251.

#### SEC. 660. Treasurer—duties.

[For earlier annotations, see code, page 284.—Ed.]

The preference given to warrant holders by this section applies only as between warrants issued in any given year. Holders of warrants for the expenses of one year have no claim on the funds of a subsequent year, at least until the expenses of the latter year are paid. *Phillips v. Reed*, 167-331. And see *Phillips v. Ried*, 109-188.

SEC. 661. **Assessor—duties—deputies—officer—supplies.** All assessors elected by cities and towns shall perform the same duties as township assessors. They may appoint such number of deputies as the council shall authorize, such appointments to be confirmed by the council. Except that in cities of the first class having a population of sixty thousand or over the board of supervisors of the county shall furnish the assessor with supplies and an office. And said assessor shall appoint such number of deputies as the board of supervisors may authorize, such appointments to be approved by the said board. If any city or town is situated in two or more counties, the assessor shall make returns of the assessment to the proper county. [19 G. A., ch. 110; 18 G. A., ch. 201, §§ 1, 2; 16 G. A., ch. 6; C. '73, § 390.] [29 G. A., ch. 30, § 1.]

#### SEC. 662. Marshal—duties.

[For earlier annotations, see code, page 284.—Ed.]

The town council is given no power to appoint a marshal. *Barter v. Beacon*, 112-744.

#### SEC. 663. Deputy marshals—duties.

A deputy marshal held not to be a peace officer under the provisions of § 4109 of Code of '73, and therefore not entitled to fees for the arrest of vagrants under 23 G. A., ch. 43. *Twinam v. Lucas County*, 104-231.

#### SEC. 666. Other officers—powers and duties.

[For earlier annotations, see code, page 285.—Ed.]

A street commissioner has apparent authority to grade the streets, and if he does so in a case where the grading is unlawful, and his acts are known to the city council and not objected to, his authority will be presumed and the city will be liable. *Brown v. Webster City*, 88 N. W., 1070.

of fire department in directing a water company as to the pressure to be maintained at certain hydrants or in certain districts does not amount to a waiver of the terms of a contract between the company and the city as to the water pressure to be maintained. *Cedar Rapids Water Co. v. Cedar Rapids*, 90 N. W., 746.

The act of the city engineer or chief

#### SEC. 668. City and town councils—powers and duties.

[For earlier annotations, see code, pages 285-8.—Ed.]

Par. 8. **Election of officers.** A record showing the election of an officer is not conclusive where it shows proceedings inconsistent with such election. *State v. Alexander*, 107-177.

The mayor cannot cast the deciding vote in case of a tie in the election of an officer. *Ibid.*

The method of voting by the city council in the election of officers rests very largely within the discretion of the majority, and the fact that the mayor, with the approval of the majority of the council, refuses to allow a member to change his vote will not invalidate the election

of the person thus declared to be elected. *Mann v. LeMars*, 109-251.

As the appointment of a marshal in towns is with the mayor, and not with the council, held that a contract made with the council to act as marshal on a salary named was invalid. *Baxter v. Beacon*, 112-744.

**Par. 14. Members not interested.** Where the council of a city was by statute authorized to fix the salaries of city officers, but the members of the council were forbidden to vote upon any question in which they were directly or indirectly interested, held, that the action of the members of the council in increasing their salaries was unlawful and that in receiving the increased salaries thus voted to themselves they were guilty of a misdemeanor in doing an act forbidden by law. *State v. Shea*, 72 N. W., 300.

**Par. 16. Appropriations.** The object

of this subdivision requiring expenditures only as the result of appropriations, is to place municipal corporations on a cash basis, preventing the accumulation of a floating indebtedness. *Windsor v. Des Moines*, 110-175.

Notwithstanding the provisions of Code section 660 that warrants which have been indorsed "not paid for want of funds" shall be paid in the order of their presentation, warrants for the expenses of one year do not take priority over the warrants for the expenses of a subsequent year with reference to the funds available for payment of the expenses of the latter year. *Phillips v. Reed*, 107-331.

The effect of the previous statutory provision that warrants should be paid in the order of presentation was to create a contract with the warrant holders which could not be impaired by subsequent legislation. *Ibid.*

**SEC. 669. Compensation of councilmen—how paid.** Councilmen in cities of the first class shall be paid an amount prescribed by ordinance, not in excess of two hundred and fifty dollars per annum, which shall be in full compensation of all services of such councilmen of every character connected with their official duties; and in all other cities and towns they shall receive not to exceed one dollar each for every regular or special meeting, and in the aggregate not exceeding fifty dollars in any one year; but in such cities and towns the members shall be paid, in addition to the foregoing, for services as members of the board of review, an amount not exceeding one dollar for each session of not less than three hours, and the compensation for services as members of the board of review shall be paid out of the county treasury. [22 G. A., ch. 24, § 1; C. '73, § 505; R., § 1095.] [28 G. A., ch. 17, § 1.]

[For earlier annotations, see code page 287.—Ed.]

**SEC. 672. Compensation of police matrons.**

If a police matron is appointed under statutory provisions, her compensation cannot be affected by contract, but to avail herself of this rule it must appear that she was appointed in virtue of the statute.

The city need not necessarily act under the statute in making such appointment, and if it does not, a contract regulating her compensation will be valid. *Daniels v. Des Moines*, 108-484.

**SEC. 673. Fees of marshal and deputy.**

[For earlier annotations, see code, page 288.—Ed.]

The county is not liable for statutory cases. *Des Moines v. Polk County*, 107-525.

**SEC. 674. Compensation of assessors and deputies.** City and town assessors and their deputies shall receive the same compensation as township assessors, which shall be determined in the same manner and payable from the county treasury. Except, that in cities of the first class having a population of sixty thousand or over the compensation of the assessor shall not be more than fifteen hundred dollars per annum, to be fixed by the board of supervisors, and that of the deputies at not more than two dollars and fifty cents (\$2.50) per calendar day, Sundays excepted, to be fixed by the board of supervisors. [C. '73, § 390.] [29 G. A., ch. 30, § 2.]

**SEC. 675. Salaries in lieu of fees.**

[For earlier annotations, see code, page 288.—Ed.]

Where salaries are provided for police judge and marshal, the city becomes en-

titled to the fees thereof in criminal cases, and may recover the same in an action

against the county. *Des Moines v. Polk County*, 107-525.

A statute granting certain cities the power to fix the compensation of mayors by ordinance, and limiting the salary to

the amount so fixed, held not to take effect in any particular city until passage of an ordinance therein adopting that plan of compensation. *State v. Olinger*, 109-669.

#### SEC. 676. Compensation of other officers.

Special policemen at elections, appointed under the provisions of Code § 1125, are not entitled to compensation from either the city or the county as no pro-

vision for such compensation is made under the statute. *Mousseau v. Sioux City*, 113-246.

### CHAPTER 2-A.

#### OF BOARD OF POLICE AND FIRE COMMISSIONERS IN CERTAIN CITIES OF THE FIRST CLASS.

**SECTION 679-a. Board created.** That there is hereby created and established a board of police and fire commissioners in cities of the first class which, according to any state or national census heretofore or hereafter taken, are shown to have a population of more than sixty thousand. [29 G. A., ch. 31, § 1.]

**SEC. 679-b. Commissioners—term—vacancies.** Said board of police and fire commissioners shall consist of three members, who shall be citizens of the state of Iowa and who shall have been residents of the city in which they are appointed for more than five years next preceding their appointment; they shall, except as hereinafter specified, hold their office for six years and until their respective successors have been appointed and qualified. All vacancies in such board by death, resignation, removal, or for any other cause, shall be filled as soon as practicable in the same manner as provided for appointment. Said commissioners shall receive no compensation for their services. [29 G. A., ch. 31, § 2.]

**SEC. 679-c. Commissioners must qualify.** Before entering upon the duties of their office each of said commissioners shall take and subscribe an oath, which shall be filed and kept in the office of the city clerk, to support the constitution of the United States and of the state of Iowa, to obey the laws, and in all of his official acts and judgments to aim only to secure and maintain an honest and efficient police and fire force, free from partisan distinction or control, and to perform the duties of his office to the best of his ability, and shall execute a bond payable to the city in which he is appointed, in the penal sum of five thousand dollars, with sureties to be approved by the city council of said city. The expense for said bond shall be paid by said city. [29 G. A., ch. 31, § 3.]

**SEC. 679-d. Mayor to appoint—terms—how selected—chairman—quorum—removal.** Immediately upon the taking effect of this act the mayor of such city shall appoint said board of police and fire commissioners, who shall be confirmed by the city council, and the said commissioners so appointed shall hold their office, one of them until the first Monday in April, 1904, one of them until the first Monday in April, 1906, and one of them until the first Monday in April, 1908; and on the last Monday in March, 1904, and on the same day in each even numbered year, thereafter, the mayor shall appoint one commissioner in such city to take the place of the commissioner whose term of office expires the first Monday in April following such appointment, and the members so appointed shall serve for the term of six years following the said first Monday in April. The chairman of the board for each biennial period shall be the member whose term first expires. The said commissioners shall be selected from the two leading political parties, so that, as far as practicable, two members of the board shall be members of the dominant

political party and one member of the board shall be a member of the political party next in numerical strength, as shown by the votes cast at the last state or national election. And any commissioner who during his term of office becomes a candidate for or accepts any other place of public trust or emolument, or who during the same period knowingly consents to his nomination for any office elective by the people, or fails to publicly decline the same within twenty days succeeding such nomination, shall be deemed to have thereby vacated his office, and a successor shall be appointed as provided in this act. The majority of said board shall constitute a quorum for the transaction of business. Any of said commissioners may be removed for misconduct or malfeasance in office, by the mayor of said city, with the consent and approval of a majority of the city council. [29 G. A., ch. 31, § 4.]

**SEC. 679-e. Board to conduct examinations—results certified—preference given.** Said board shall, on the first Monday of April and October of each year, or oftener if they shall deem it necessary, under such rules and regulations as it may prescribe, hold examinations for the purpose of determining the qualifications of applicants for positions on the police and fire force of said city, which examinations shall be practical in their character and shall relate to those matters which will fairly test the fitness of the persons examined to discharge the duties of the position to which they seek to be appointed; such examination shall cover the physical, as well as other qualifications of the applicants. Said board shall, as soon as possible after such examinations, certify to the chief of police and the chief of the fire department the names of the ten persons who, according to its records, have the highest standing as a result of said examination, and all vacancies which occur in the police and fire force prior to the date of the next regular examination shall be filled from said list so certified; provided, however, that should said list for any cause become reduced to less than three, then the chief of police or the chief of the fire department, as the case may be, may temporarily fill a vacancy until the next examination of the board.

In all examinations and appointments under the provisions of this act honorably discharged soldiers, sailors or marines of the regular or volunteer army or navy of the United States shall be given a preference, if otherwise qualified. [29 G. A., ch. 31, § 5.]

**SEC. 679-f. Police and fire departments—officers—salaries—clerk of board—record.** The officers of the police force in said city shall be a marshal who shall be *ex officio* chief of police, and shall be appointed by the mayor of said city, and such other officers as the city council may designate; and the officers of the fire department shall be chief of the fire department, who shall be elected by the city council, and such other officers as the city council may designate. The city council of said city shall fix the salary of the marshal and of the chief of the fire department, and shall fix the number of policemen and firemen for the police and fire force, and shall fix the salaries to be paid to each. The city council shall also provide a suitable room in which the said board of police and fire commissioners may hold its meetings, and the board may appoint a clerk, whose salary shall be fixed by the city council. Said board shall keep a record of all its meetings and proceedings. [29 G. A., ch. 31, § 6.]

**SEC. 679-g. Appointments—how and by whom made.** As soon as practicable after the passage of this act the chief of police shall appoint the police force for said city and the chief of the fire department shall appoint the fire force for said city. In the first instance the chief of police and the chief of the fire department may appoint on the police and fire force, without examination, the persons who have been in the employ of the city in these capacities for more than three consecutive years next preceding the creation of said board, and as soon as said appointments are made the chief of police and chief of the fire department shall notify the board of the number of policemen or firemen necessary to fill his department, and the board shall

proceed to hold an examination of applicants for said positions, and at this examination the board may consider the experience and service in the case of persons who are on the police and fire force of said city at the time of the passage of this act, and if said persons are found to have been efficient, and are otherwise qualified, they shall be given a preference for continuance in such employment or place. The board shall certify to the chief of police and the chief of the fire department a list of persons double the number necessary to fill said force, who have passed a satisfactory examination, and who by its records have the highest standing as the result of said examination, from which list the chief of police and chief of the fire department shall appoint the number necessary to fill his respective force, and thereafter additions to said police and fire force, and removals therefrom, shall be made only in accordance with other sections of this act. [29 G. A., ch. 31, § 7.]

**SEC. 679-h. Removals and discharges—appeal.** All police officers and policemen, except the chief of police, and all firemen, except the chief of the fire department, shall be subject to removal by the board of police and fire commissioners for misconduct or failure to perform their duty, under such rules and regulations as may be adopted by said board whenever said board shall consider and declare said removal necessary for the proper management or discipline of said department; but the chief of police or the chief of the fire department may peremptorily suspend or discharge any member of his force for misconduct or neglect of duty or disobedience of orders; provided, that any person so suspended or discharged, within five days thereafter may appeal to said board and said board shall investigate the causes of his removal or discharge, and if the same are found insufficient, he shall be reinstated.

The board shall have the power to enforce the attendance of witnesses and the production of books and papers and to administer oaths in the same manner and with like effect and under the same penalties as in the case of magistrates exercising civil or criminal jurisdiction under the statutes of Iowa. [29 G. A., ch. 31, § 8.]

**SEC. 679-i. Qualifications of appointees—political contributions.** No person shall be appointed or employed on the police or fire force of said city who is not a citizen of the United States and who has not been a resident of said city for more than one year next preceding said appointment, and who is not able to read and write the English language, and who is not of good moral character, or who is addicted to the use of intoxicating liquor as a beverage. No member of said police or fire force shall directly or indirectly contribute any money to any person for nomination or election purposes, and no person shall be appointed to or removed from said police or fire force on account of his political beliefs. [29 G. A., ch. 31, § 9.]

**SEC. 679-j. Penalty.** Any person violating the provisions of this act shall be guilty of a misdemeanor, and upon conviction shall pay a fine not to exceed one hundred dollars (\$100), or be imprisoned in the county jail not to exceed thirty days. [29 G. A., ch. 31, § 10.]

### CHAPTER 3.

#### OF ORDINANCES, COURTS AND FINES.

##### SECTION 680. Power to pass ordinances—penalties.

[For earlier annotations, see code, page 289.—Ed.]

Under the authority to provide for the safety of its inhabitants a city has authority to pass an ordinance requiring bicycles on the streets after dark to carry lights. *Des Moines v. Keller*, 88 N. W., 827.

The creating or changing of the boundary of wards must be by ordinance and cannot be by resolution. *Cascaden v. Waterloo*, 106-673.

The violation of a municipal ordinance

enacted by the authority of the state is a crime and proceedings for its punishment are criminal. *Ewing v. Webster City*, 103-226.

The city council cannot in the exercise

of its general powers pass an ordinance providing a penalty for keeping saloons open on election day, as such an ordinance would be in conflict with the state law on the same subject. (See Code § 2448.) *Iowa City v. McInnerry*, 114-586.

### SEC. 681. Adoption of ordinances.

[For earlier annotations, see code, page 290.—Ed.]

The title of "an ordinance to regulate bicycles" is sufficient to cover provisions requiring riders of bicycles to carry a sufficient light after dark. *Des Moines v. Keller*, 88 N. W., 827.

Failure to comply with a directory statute with reference to the recording of ordinances does not affect their validity. *Allen v. Davenport*, 107-90.

In amending, repealing or suspending an ordinance with reference to a matter which can be regulated by ordinance only, the council must act by ordinance and cannot proceed by resolution. *Cascaden v. Waterloo*, 106-673.

The amending ordinance must contain the entire ordinance or section revised or amended. *Ibid.*

**SEC. 683. Adoption—majority vote.** No resolution or ordinance for any of the purposes hereinafter set forth shall be adopted without the concurrence of a majority of the whole number of members elected to the council, to wit:

1. To pass or adopt any by-law or ordinance;
2. To pass or adopt any resolution or order to enter into a contract;
3. To pass or adopt any ordinance for the appropriation or payment of money; but in towns, by-laws, ordinances, and the resolutions and orders set forth in this section, shall require for their passage or adoption a concurrence of four councilmen, or of three councilmen and the mayor. On the passage or adoption of every by-law, ordinance, and every such resolution or order, the yeas and nays shall be called and recorded. No money shall be appropriated except by ordinance. In towns money may be appropriated by resolution. [18 G. A., ch. 146, §§ 2, 3; C. '73, §§ 489, 493; R., §§ 1122, 1134.] [27 G. A., ch. 19, § 1.]

[For earlier annotations, see code, page 291.—Ed.]

The concurrence of a majority of the whole number of the council is required for the adoption of a resolution. *Cascaden v. Waterloo*, 106-673.

Where the minutes of the action of the

council show the names of the members voting, it will be presumed that the vote was by yeas and nays. *German Ins. Co. v. Manning*, 95 Fed., 597.

### SEC. 684. Two-thirds vote.

[For earlier annotations, see code, page 292.—Ed.]

The mayor being a member of the council in cities of the second class, under Code of '73, held that in determining whether there had been a three-fourths vote of the council to dispense with a rule

as to reading an ordinance on three successive days, the mayor should be included, although not entitled to a vote except in case of a tie. *Griffin v. Messenger*, 114-99.

### SEC. 685. Signing by mayor—veto—passing over veto.

[For earlier annotations, see code, page 292.—Ed.]

Action of a city council in allowing a claim against the city is a "resolve," and requires the signature of the mayor. Without such signature, or facts making the resolve valid notwithstanding the want of approval, the action of the council is invalid. *Stutsman v. McVicar*, 111-40.

The requirement that the mayor sign resolutions or ordinances of the city council before they take effect is mandatory,

and the successor of the mayor in office when the ordinance or resolution is passed has no power to make it valid by his signature. *Altman v. Dubuque*, 111-105.

Under prior statutory provisions held that in cities of the second class having less than 8,000 inhabitants, the signature of the mayor to a resolution passed by the council was not necessary. *Bennett v. Marion*, 106-628.

**SEC. 686. Recording—publishing.**

[For earlier annotations, see code, pages 292-3.—Ed.]

Publication as required by statute is essential to the validity of an ordinance, and held in a particular case that the publication in an extra edition of a daily paper, only a few copies of which were issued and sold, was not such publication as contem-

plated by law. *State v. Omaha & C. B. R. Co.*, 113-30.

A resolution or ordinance making a special assessment may be proven by parol evidence. *Edwards & Walsh Const. Co. v. Jasper County*, 90 N. W., 1006.

**SEC. 692. Procedure—appeal—judicial notice.**

[For earlier annotations, see code, pages 294-5.—Ed.]

The town or city court has always taken judicial notice of the ordinances of the municipality in which it sits, as it stands in the same relation to these as does the state court to public statutes, and under the provision of this section the district court on appeal is required likewise to

take judicial notice of such ordinances. *Scranton v. Danenbaum*, 109-95.

In a prosecution for violation of an ordinance the ordinance must be pleaded. Courts will not take judicial notice of an ordinance, except in case of appeals from inferior tribunals. *State v. Olinger*, 109-669.

## CHAPTER 4.

## OF GENERAL POWERS.

**SECTION 695. Bodies corporate—name—authority.**

[For earlier annotations, see code, pages 295-6.—Ed.]

**Extent of powers.** Municipal corporations have and can exercise such powers only as are expressly granted by their charters or legislative acts, or are necessarily implied therefrom, or are necessarily incidental thereto. *Aldrich v. Paine*, 106-461.

The power to levy taxes may be delegated to a municipal corporation but not to a board or tribunal not elected by the people of the municipality. *State ex rel. v. Mayor, etc., of Des Moines*, 103-76.

The city council, having the right to order a work of public improvement and having adopted an ordinance and resolution directing the work according to certain specifications, acquires jurisdiction over the property involved. *Allen v. Dav- enport*, 107-90.

A taxpayer may maintain an action to enjoin the carrying out of a resolution increasing the number of wards in a city, there being no authority to change the wards by resolution. *Cascaden v. Waterloo*, 106-673.

**Liability for acts of officers.** A municipal corporation is not as a general rule liable for the negligence or carelessness of its agents or servants in handling its fire apparatus. The service performed is one in which it has no particular interest, and from which it derives no special benefit in its corporate capacity. Such employes are not agents and servants of the city, but act as officers charged with a pub-

lic service, for whose negligence no action will lie against the city. Where the powers conferred are governmental in nature the city cannot be made liable for the execution thereof. *Saunders v. Ft. Madison*, 111-102.

The city is not liable for the acts of its officers in making an arrest without legal cause or excuse, and unlawfully, cruelly and inhumanly treating such person by imprisoning him in an unsuitable place. *Lahner v. Inc. Town of Williams*, 112-428.

Where a city contracting for macadamizing streets undertakes to furnish the use of a steam roller in charge of its own employes it is liable for damage by fire set out by sparks by reason of the defective condition of the engine. *McMahon v. Dubuque*, 107-62.

A city is thus liable where it is engaged in doing with its own instrumentality that which it was authorized to contract with another to do at the expense of the abutting lot owners, and the work was voluntarily assumed and carried on for compensation. *Ibid.*

The city having power to make excavations in the streets is liable for the wrongful acts of its officers or agents in making such excavations. *Millard v. Webster City*, 113-220.

A municipal corporation is not estopped by the acts of its officers done without authority. *Cedar Rapids Water Co. v. Cedar Rapids*, 90 N. W., 746.

**SEC. 696. Prevention of nuisances—regulation of slaughter houses.** They shall have power to prevent injury or annoyance from anything dangerous, offensive or unhealthy, and to cause any nuisance to be

abated; to provide for the destruction of weeds and other noxious growths upon any of the lots and parkings therein, and to provide for the assessment of the cost thereof to the property; to provide for the immediate seizure and destruction of tainted or unsound meat or other provisions; to establish all needful regulations as to the management of packing and slaughter houses, renderies, tallow chandleries and soap factories, bone factories, tanneries, and manufactories of fertilizers and chemicals, within the limits of such cities or towns; to regulate and restrain the deposit and removal of all offensive material and substances, and the engendering of offensive odors and sights therefrom, so as to protect the public against the same; to establish and regulate slaughter houses; and, in cities having five thousand or more inhabitants, to build and control the same. [22 G. A., ch. 16, § 1; 19 G. A., ch. 89, § 9; C. '73, §§ 456, 526; R., §§ 1057, 1096.] [27 G. A., ch. 22, § 1.]

[For annotations, see code, pages 296-7.—Ed.]

#### SEC. 698. Filling or draining lots.

[For earlier annotations, see code, page 297.—Ed.]

This section relates to water standing in depressions or pools and not to large areas of low, wet or swampy land. The authority of the council is limited to ob-

viating the nuisance occasioned by the standing of stagnant water. *Aldrich v. Paine*, 106-461.

#### SEC. 699. Drainage preserved.

The provisions of this section are intended to restore the natural courses for surface or other water in case it has been obstructed by grading or filling. *Aldrich v. Paine*, 106-461.

property abutting on a street to construct drains to carry off the surface water accumulated by improvements of the street. The provisions of this section relate to natural water courses. *Hoffman v. Muscatine*, 113-332.

#### SEC. 700. Regulations—licenses—engineers—examinations.

They shall have power to regulate, license and tax hotels, restaurants and eating houses; to define by ordinance who shall be considered transient merchants; to regulate, license and tax their sales and those of auctioneers, bankrupt and dollar stores, and the like, but the exercise of such power shall not interfere with sales made by sheriffs, constables, coroners, marshals, executors, guardians, assignees of insolvent debtors or bankrupts, or any other person required by law to sell real or personal property; to regulate, license and tax peddlers, house movers, plumbers, bill-posters, itinerant doctors, itinerant physicians and surgeons, junk dealers, scavengers, pawnbrokers, and persons receiving actual possession of personal property as security for loans, with or without a mortgage or bill of sale thereon, and to provide for the examination and licensing engineers of stationary engines. [22 G. A., ch. 16, § 1; 19 G. A., ch. 89, § 1; 16 G. A., ch. 24; C. '73, §§ 462-3; R., § 1063.] [27 G. A., ch. 21, § 1; 27 G. A., ch. 22, § 2.]

[For annotations, see code, page 298.—Ed.]

**SEC. 704. Gambling houses—disorderly houses.** They shall have power to suppress, restrain and prohibit gambling houses, disorderly houses, houses of ill fame, opium or hop joints, or places resorted to for the use of opium or hasheesh, and punish the keepers thereof, and persons resorting thereto. [C. '73, § 456; R., § 1057.] [28 G. A., ch. 18, § 1.]

[For annotations, see code, page 300.—Ed.]

#### SEC. 711. Fires—electric apparatus—fire limits.

[For earlier annotations, see code, page 301.—Ed.]

A building erected in violation of an ordinance fixing fire limits may be torn down or removed without any judicial proceeding whatever. But one who is erecting a building with the intention of complying

with the law has a reasonable time within which to put his building into the condition required by ordinance. *Lemmon v. Guthrie Center*, 113-36.

**SEC. 716-a. Levy for fire fund.** That any city of the second class may levy a tax in any one year of not more than one mill on the dollar of the assessed valuation of the taxable property within the corporate limits for the purpose of maintaining a fire department; and the money so raised shall constitute a fire fund, and shall be applied to no other purpose. [27 G. A., ch. 20, § 1.]

**SEC. 717. Markets.**

[For earlier annotations, see code, page 802.—Ed.]

A city may require that any person buying or selling by weight within the city limits shall have the commodity bought or sold weighed on the public scales and the fact that a grain buyer has a place of business remote from the public scales so that he suffers a disadvantage by being compelled to have the grain which he buys weighed at such scales will not be a ground for enjoining the enforcement of such ordinance. *Ewing v. Webster City*, 103-226.

**SEC. 720. Heating plants—water or gas works—electric plants.** They shall have power to purchase, establish, erect, maintain and operate, within or without the corporate limits of any city or town, heating plants, waterworks, gas works or electric light or electric power plants, with all the necessary reservoirs, mains, filters, streams, trenches, pipes, drains, poles, wires, burners, machinery, apparatus and other requisites of said works or plants, and lease or sell the same. They may also grant to individuals or private corporations the authority to erect and maintain such works or plants for a term of not more than twenty-five years, and may renew or extend the term of such grant; but no exclusive franchise shall be thus granted, extended or renewed. No such works or plants shall be authorized, established, erected, purchased, leased or sold, or franchise extended or renewed, unless a majority of the legal electors voting thereon vote in favor of the same at a general or special election. [26 G. A., ch. 13; 22 G. A., ch. 11, §§ 1, 2; 22 G. A., ch., 26; C. '73, §§ 471-3.] [28 G. A., ch. 19, § 1.]

[For earlier annotations, see code, pages 303-4.—Ed.]

Although the city attempts to give an exclusive monopoly to a water company, that fact will not nullify the portions of the contract giving the company the right to furnish water. *Kimball v. Cedar Rapids*, 100 Fed., 802.

Under statutory provision authorizing cities to contract with a company for the erection of waterworks and furnishing water for public use, and providing that

the city might levy a tax to pay for water taken for public use, not in excess of five mills on the dollar for any one year, held that the power to levy the tax was not a limitation on the power to contract, and that the city might be liable for the contract price in excess of the proceeds of the tax. *Fort Madison Water Co. v. Ft. Madison*, 110 Fed., 901; *Ft. Madison v. Fort Madison Water Co.*, 114 Fed., 292.

**SEC. 721. Question submitted—notice—how given.** The council may order any of the questions provided for in the preceding section submitted to a vote at a general election, or at one specially called for that purpose; or the mayor shall submit said question to such vote upon the petition of twenty-five property owners of each ward in the city, or of fifty property owners of any incorporated town. Notice of such election shall be given in two newspapers published in said city or town, if there are two, if not, then in one, once each week for at least four consecutive weeks. But if no such newspaper is published within the limits of the corporation, then such notice may be given by posting copies thereof in three public places within the limits of said corporation, two of which places shall be the postoffice and the mayor's office of such city or town. The party asking for a renewal or extension of such franchise shall pay the cost incurred in holding such election. [22 G. A., ch. 11, § 4.] [29 G. A., ch. 32, § 1.]

[For earlier annotations, see code, page 304.—Ed.]

Where the question submitted was whether the town should issue bonds for the purpose of erecting, maintaining and

operating a system of waterworks, held that this was not a submission of the question whether such waterworks should be

constructed by the town, and the adoption of the proposition did not authorize such construction. The precise question to be passed upon should be placed in plain terms before the voters. *Brown v. Carl*, 111-608.

Also held that the incorporation into such question of the proposition that the proceeds of the bonds should be used to some extent in the maintenance of the waterworks was improper, and being in the nature of an inducement to the voter

to cast an affirmative ballot, vitiated the acceptance of the proposition. *Ibid.*

Under Code § 955, providing for notice of application for waterworks franchises in cities under special charter, which section contains provisions similar to this section, held that the notice provided for is one not only advising the property owners that the franchise is desired, but also of the very terms of such franchise. *Hall v. Cedar Rapids*, 88 N. W., 448.

**SEC. 724. Rates—taxes.** They shall have power, when operating such works or plants, to assess from time to time, in such manner as they shall deem equitable, upon each tenement or other place supplied with water, gas, heat, light or power, reasonable rents or rates fixed by ordinance, and to levy a tax, as hereafter provided, to pay or aid in paying the expenses of running, operating, renewing, extending and repairing such works or plants owned and operated by such city or town, and the interest on any bonds issued to pay all or any part of the cost of their construction. [22 G. A., ch. 11, § 2; C. '73, § 475.] [28 G. A., ch. 19, § 1.] [29 G. A., ch. 33, § 1.]

**SEC. 725. Regulation of rates and service.** They shall have power to require every individual or private corporation operating such works or plant, subject to reasonable rules and regulations, to furnish any person applying therefor, along the line of its pipes, mains, wires, or other conduits, with gas, heat, water, light or power, and to supply said city or town with water for fire protection, and with gas, heat, water, light or power for other necessary public purposes, and to regulate and fix the rent or rate for water, gas, heat, light or power; to regulate and fix the rents or rates of water, gas, heat and electric light or power; to regulate and fix the charges for water meters, gas meters, electric light or power meters, or other device or means necessary for determining the consumption of water, gas, heat, electric light or power, and these powers shall not be abridged by ordinance, resolution or contract. [22 G. A., ch. 11, § 2; 22 G. A., ch. 16, § 1; C. '73, §§ 473, 475.] [28 G. A., ch. 19, § 1.]

[For earlier annotations, see code, page 305.—Ed.]

A contract by which the city is required a period of years held invalid. *Hall v. Cedar Rapids*, 88 N. W., 448.

**SEC. 727. Public library—bequests—conditions of—how enforced.** Cities and towns shall have power to provide for the formation and maintenance of a free public library, open to the use of all the inhabitants, under proper regulations, and may purchase land and erect buildings, or hire buildings or rooms, suitable for that purpose, and provide for the compensation of the necessary employes; may receive, hold or dispose of any and all gifts, donations, devises and bequests that may be made to them for the purpose of establishing, increasing or improving any such library; and when the conditions of such gifts, donations, devises, and bequests have once been accepted by the council, the performance of such conditions may be enforced at the instance of the library board by mandamus and by other due process of law; and the council may apply the profits, proceeds, interest and rents accruing therefrom in such manner as will best promote the prosperity and utility of such library; but no money can be appropriated for such purpose until the electors of such city or town shall, at a general or special election, have voted for the establishment of such library. [C. '73, § 461.] [29 G. A., ch. 34, § 1.]

**SEC. 727-a. Special charter cities.** This act shall apply to cities acting under special charter. [29 G. A., ch. 34, § 2.]

The power to levy taxes for library purposes cannot be vested by the legislature in the board of library trustees not elected by the people, but appointed by the mayor

with the advice and consent of the council. *State ex rel. v. Mayor, etc., of Des Moines*, 103-76.

**SEC. 729. Powers.** Said board of library trustees shall have and exercise the following powers: To meet and organize by the election of one of their number as president of the board, and by the election of a secretary and such other officers as the board may deem necessary; to have charge, control and supervision of the public library, its appurtenances and fixtures, and rooms containing the same, directing and controlling all the affairs of such library; to employ a librarian, such assistants and employes as may be necessary for the proper management of said library, and fix their compensation; but, prior to such employment, the compensation of such librarian, assistants and employes shall be fixed for the term of employment by a majority of the members of said board voting in favor thereof; to remove such librarian, assistants or employes by a vote of two-thirds of such board for misdemeanor, incompetency or inattention to the duties of such employment; to select and make purchases of books, pamphlets, magazines, periodicals, papers, maps, journals, furniture, fixtures, stationery and supplies for such library; to authorize the use of such libraries by non-residents of such cities and towns and to fix charges therefor; to make and adopt, amend, modify or repeal by-laws, rules and regulations, not inconsistent with law, for the care, use, government and management of such library and the business of said board, fixing and enforcing penalties for the violation thereof; and to have exclusive control of the expenditures of all taxes levied for library purposes as provided by law, and of all other moneys belonging to the library fund. Said board shall keep a record of its proceedings. [26 G. A., ch. 50, § 1; 25 G. A., ch. 41, § 2.] [28 G. A., ch. 20, § 1.]

**SEC. 729-a. Library buildings—condemnation of ground for location of.** In any city or town in which a free library has been or may hereafter be established, the board of library trustees shall have the power to condemn real estate in the name of the city or town for the location and construction of library buildings and for branch libraries, and for the purpose of enlarging the grounds for such library buildings and branch libraries. [29 G. A., ch. 35, § 1.]

**SEC. 729-b. Condemnation proceedings.** Proceedings for condemnation of land as contemplated in this act, shall be in accordance with the provisions of the code relating to taking private property for works of internal improvement, except that no attorney's fee shall be taxed or allowed for the owner of the real estate. [29 G. A., ch. 35, § 2.]

**SEC. 729-c. Special charter cities.** This act shall apply to cities acting under special charter. [29 G. A., ch. 35, § 3.]

**SEC. 732. Library tax.** The board of trustees shall, before the first day of August in each year, determine and fix the amount or rate, not exceeding two mills on the dollar in all cities and in towns, of the taxable valuation of such city or town, to be levied, collected and appropriated for the ensuing year for the maintenance of such library; and in cities and towns also the amount or rate, not exceeding three mills on the dollar of the taxable valuation of such city, to be levied, collected and appropriated for the purchase of real estate and the erection of a building or buildings thereon for a public library, or for the payment of interest on any indebtedness incurred for that purpose, and for the creation of a sinking fund for the extinguishment of such indebtedness; and shall cause the same to be certified to the city council, which shall levy such tax or so much thereof as it may deem necessary to promote library interests for each of said purposes so determined and fixed, and certify the per cent. thereof to the county auditor, with the other taxes for said year. [26 G. A., ch. 50, § 2; 25 G. A., ch. 41, § 4.] [28 G. A., chs. 21, 22, § 1.] [29 G. A., ch. 36, § 1.]

**SEC. 732-a. Special charter cities.** This act shall apply to cities acting under special charter. [28 G. A., ch. 22, § 2.]

[Section 732-a is section 2 of chapter 22 of the acts of the 28th G. A. Section 1, of the same chapter amended section 732 by inserting the clause, "such tax or so much thereof as it may deem necessary to promote library interests."—Ed.]

**SEC. 737. Plumbing—inspector.** They shall have power by ordinance to prescribe rules and regulations for all plumbing connecting any building with sewers, water mains and gas pipes; and may prescribe the kind and size of materials to be used in such plumbing, and the manner in which the same shall be done; and to appoint an inspector thereof, and define his duties and powers; and to provide for the assessment of the cost of such inspection and replacing the pavement to the property; and to prescribe penalties for the violation of such ordinance. Nothing herein shall be construed as authorizing the annulment of any rules or regulations relating to such plumbing made by the local or state board of health, but such ordinance shall conform to and enforce the same. [26 G. A., ch. 14.] [27 G. A., ch. 22, § 3.]

**SEC. 740. Power to take property by gift or bequest—how administered.** Counties, cities, towns and school corporations, are authorized to take and hold property, real and personal, derived by gifts and bequests; and to administer the same through their proper officers in pursuance of the terms of the gift or bequest; and when made for the establishing of institutions of learning or benevolence, and there is no provision made in the gift or bequest for the execution of the trust, the court having charge of the probate proceedings in the county shall appoint three trustees, residents of said county, who shall have charge and control the same, and who shall continue to act until removed by the court. And they shall give bond as required in case of executors, to be approved in the same manner as in case of executors' bonds, and said trustees shall be subject to the orders of said court. [26 G. A., ch. 20.] [28 G. A., ch. 23, § 1.]

[For annotations, see code, page 308.—Ed.]

**SEC. 741-a. Accounts—how kept—receipts and vouchers.** That all cities and towns, including cities acting under special charter, shall establish and keep their accounts so the same shall exhibit a true and detailed statement of all public funds collected, received and expended on account of such municipality for any purpose, whatever, by any and all public officers, employes or other persons. Such accounts shall show the receipt, use and disposition of all public property, and the income, if any, derived therefrom, and of all sources of public income and the amount due and received from each source. All receipts, vouchers and other documents kept, or that may be required to be kept, necessary to prove the validity of every transaction and the identity of every person having any beneficial relation thereto, shall be filed and preserved in the office of the clerk or recorder as the case may be. [29 G. A., ch. 37, § 1.]

**SEC. 741-b. Separate accounts.** Separate accounts shall be kept for every appropriation, showing date and manner of each payment made out of the funds provided by such appropriation, the name and address of each person or corporation to whom paid, and for what purpose paid. Separate accounts shall be kept for each department, public improvement, or undertaking and for each public utility owned or operated by the said municipality. Said separate accounts for each public utility shall show the true and entire cost of the said utility and operation thereof, the amount collected annually by general or special taxation for the services rendered to the public, and the amount and character of the service rendered therefor, and the amount collected annually from private users, if any, for the services rendered to them, and the amount and character of the services rendered therefor. [29 G. A., ch. 37, § 2.]

**SEC. 741-c. Annual report—publication.** Each municipality shall make an annual public report, which shall contain an accurate statement, in summarized form, of all collections made or receipts of such municipality from all sources, all accounts due the public, but not collected, and all expenditures for every purpose; and a statement in detail of the cost and operation and all income of each public utility operated or owned by the municipality. Said report shall further show in detail the entire public debt of such municipality, and the amount of debt, which the municipality may under the law contract for the year for which the report is made. Said report shall be published annually at the close of the fiscal year in at least two newspapers of general circulation in said city or town as the case may be, but if only one paper is so published, then in one, and if none be published, then by posting a copy in three public places in said city or town. [29 G. A., ch. 37, § 3.]

## CHAPTER 5.

### OF THE PURCHASE AND CONSTRUCTION OF WATER WORKS.

**SECTION 742. Tax—sinking fund.** Cities of the first class shall have power to levy, in addition to the regular water tax authorized by law, a tax of two mills upon the dollar upon all the property within the corporate limits of said cities, excepting lots greater than ten acres in area, used for horticultural or agricultural purposes, for the purpose of creating a sinking fund, to be used as provided in this chapter for the purchase or erection of water works in such cities, or for the payment of any indebtedness incurred by such cities for water works now owned by the same. The proceeds of such two-mill levy shall be deposited in one or more solvent banks or trust companies of the city making such levy, at a rate of interest not less than three per cent. per annum, compounded semi-annually, and payable, principal and interest, on demand, after sixty days' notice in writing. The city treasurer depositing the proceeds of such tax shall exact from the bank or trust company wherein such money is deposited a satisfactory bond, payable to the city, to be approved by the treasurer and mayor of such city, and to be filed in the office of the city treasurer. [26 G. A., ch. 1, § 1.] [27 G. A., ch. 23, § 1; 28 G. A., ch. 24, § 1.]

A city may provide for a tax to be levied before the contract for the purchase or construction of the works is entered into. The council may first determine the kind and cost of the works to be erected, the amount of tax to be levied and other incidental matters before submitting the matter to the voters. *Youngerman v. Murphy*, 107-686.

**SEC. 742-a. Special charter cities.** This act shall apply to cities acting under special charter. [28 G. A., ch. 24, § 2.]

[Section 742 a is section two of chapter 24 of the acts of the 28th G. A. Section one of said chapter amends Sec. 742 of the code by changing the rate of interest from four to three per cent.—Ed.]

**SEC. 742-b. Authority to loan—conditions.** That wherever any corporation engaged in maintaining and operating a water works plant within any city of this state where the United States has or may hereafter establish a military reservation within a distance of five miles from either of the boundaries of said city and such city has either under the provisions of chapter one (1) of the acts of the twenty-sixth (26th) general assembly or of section seven hundred and forty-two (742) of the code levied taxes for the purpose of creating a sinking fund to be used for the purchase or erection of water works therein, such city shall be authorized to loan a portion not however to exceed fifty thousand dollars of the proceeds of the taxes so levied

to such corporation so maintaining and operating such water works plant, with interest at a rate not less than two per cent. per annum, for a period of not more than ten years from the date of the passage of this act upon such terms as the city council of such city may approve. Provided, however, that such corporation shall apply the proceeds of every such loan to the laying of a main with the necessary attachments and usual branches to hydrants from its pumping station or other connection with its mains to the said military reservation and to make the changes in its plant which may be required to furnish the service demanded by the United States at such reservation. [29 G. A., ch. 38, § 1.]

[Section 2, chap. 38, of the acts of the 29th G. A., legalizes a certain agreement between the city of Des Moines and the Des Moines Water Works company, in contemplation of a loan for the purposes mentioned in the preceding section, and being merely a temporary legalizing act, it is omitted from this work.—Ed.]

**SEC. 742-c. Reversion of funds loaned.** That when the funds that have been loaned as provided in section one (1) of this act, and the interest thereon, are repaid to the city to which they belong, said funds together with all interest derived therefrom shall immediately revert to the fund for which the said taxes were levied and thereafter be used for no other purpose than as authorized by chapter one (1) of the acts of the twenty-sixth general assembly or section seven hundred and forty-two (742) of the code. [29 G. A., ch. 38, § 3.]

**SEC. 742-d. Water for military reservations—how furnished.** That all individuals or private corporations to which any city in this state has granted authority to erect and maintain water works with all the necessary reservoirs, mains, filters, pipes and other appurtenances in such city, including the Des Moines Water Works company now owning and operating such a plant in the city of Des Moines, shall whenever the United States has, or may hereafter establish a military reservation within a distance of five miles from either of the boundaries of such city, be authorized to use said water works plant in said city, and the mains now or hereafter laid in the highways of said city for the purpose of furnishing water to such military reservation, such authority to continue so long as under franchises now held or hereafter granted such individuals or corporations shall be authorized to maintain and operate such water works plant in such cities. [29 G. A., ch. 207, § 1.]

**SEC. 742-e. Mains in highways.** The board of supervisors of any county in which such military reservation is or may hereafter be located, shall have the power to authorize any such individual or corporation to lay its mains in any of the highways of the county for the purpose of extending the same to any such military reservation. [29 G. A., ch. 207, § 2.]

**SEC. 744. Purchase or erection—indebtedness heretofore incurred.** Cities of the first class are hereby authorized to purchase or erect water works, under the provisions of this chapter, for the purpose of supplying said cities and the inhabitants thereof with water, and are authorized to continue the levy of the two-mill tax herein provided for until the purchase price, principal and interest, or the cost incurred in the erection of said works, or the indebtedness heretofore incurred for and on account of such works, is fully paid and discharged. [26 G. A., ch. 1, § 3.] [27 G. A., ch. 23, § 2.]

**SEC. 745. Contracts—bonds—cities procuring or owning water works.** Cities levying such sinking fund tax are hereby authorized to let a contract or contracts for the purchase or erection of water works, and, upon the approval and adoption of such contract or contracts as hereinafter provided, to apply such sinking fund upon the cost thereof, and cities so purchasing or constructing and those now owning such water works are authorized to pledge the proceeds of the continuing two-mill levy provided

for in this chapter, and the regular water levy, and the net revenues derived from the operation of the water works, and shall have the right to mortgage or bond such works, to secure the payment of the purchase price or the cost of constructing such water works, or the cost of making necessary extensions and improvements of such water works, and such cities shall have the right to execute additional mortgage or mortgages or bonds upon such works for the purposes above set forth. Provided that said additional mortgage or mortgages or bonds shall bear not more than six per cent. interest per annum; but no part of the general fund of such city shall be applied upon such contracts, bonds or mortgage. In the payment thereof, the city and holders of said contracts, bonds or mortgages shall be restricted to the proceeds of the said taxes and the net revenues of the said water works, as hereinbefore provided; and such contract, contracts or bonds shall not bear a higher rate of interest than five per cent. per annum, payable semi-annually. [26 G. A., ch. 1, § 4.] [27 G. A., ch. 23, § 3.] [29 G. A., ch. 39, § 1.] [29 G. A., ch. 40, § 1.]

**SEC. 745-a. Special charter cities.** This act shall apply to cities acting under special charter. [29 G. A., ch. 40, § 2.]

[The above section is section 2, chapter 40, of the acts of the 29th general assembly, making said act applicable to cities under special charters.—Ed.]

**SEC. 746. Question submitted.** Said contract or contracts shall not be binding upon said city until the same shall have been approved by the city council at a regular meeting, or a special meeting called for such purpose, and shall have been adopted by a majority of the electors of said city voting at a special election, which shall have been duly called after thirty days' notice by said city. The proposition to be submitted at said election, and the form of ballot, shall be: "Shall the contract or contracts approved by the city council in relation to the water works be adopted?" The proposition shall be printed and placed on the ballots, and the voter shall designate his choice, and the election shall be conducted, in the manner provided in the chapter on elections. [26 G. A., ch. 5, § 1.] [29 G. A., ch. 39, § 1.]

[Section 747 was repealed by chapter 41, acts of the 29th G. A., which took effect by publication March 15, 1902, while chapter 39, acts of the 29th G. A., which took effect by publication March 28, 1902, amends, or attempts to amend said section 747, which had been repealed by chapter 41, aforesaid.—Ed.]

The electors do not determine the abstract question of waterworks or no waterworks. They simply approve or disapprove of the particular contracts submit-

ted to them. The ultimate question of the establishment of such works rests with the city council. *Youngerman v. Murphy*, 107-686.

#### SEC. 747. Trustees.

A resident and taxpayer has such interest in the matter as to be entitled to institute proceedings by *quo warranto* to test the validity of the appointment of trustees under this section. *State ex rel. v. Barker*, 89 N. W., 204.

The provisions of this section, as amended by acts of 27 G. A., chap. 23, and 28 G. A., chap. 25, are unconstitutional because

they take the control and management of the waterworks away from the city council and also because they provide for the exercise by the judges of the district court of authority not judicial in its nature nor connected with the exercise of the judicial power conferred on the courts by the constitution. *Ibid.*

**SEC. 747-a. Repeal—trustees—appointment—term—vacancies—compensation—bond—removal.** That section seven hundred forty-seven (747) of the code as amended, be and the same is hereby repealed, and the following enacted in lieu thereof:

The water works now owned or hereafter purchased or erected by such cities shall be managed and operated by a board of water works trustees, which shall be composed of three resident electors, appointed for the term of six years by the mayor of said city. Upon the taking effect of this act, in

cities now owning such water works, or upon the approval of the contract for the purchase or erection of water works by cities as herein provided, the mayor thereof shall, within ten days thereafter, appoint such board of water works trustees, the first appointees thereto to hold office for the following designated terms, namely, one for two years, one for four years, and one for six years. All vacancies occurring on said board, occasioned by expiration of term, by death, resignation or removal, shall be filled by appointment of the mayor of such city. The compensation of said trustees shall be three hundred dollars per year to each member of said board. Each of the said trustees shall execute and furnish to the city an official bond in the sum of five thousand dollars, to be approved by the mayor and filed with the city clerk. Such trustees may be removed from office for proper cause under the provisions of chapter eight (8) of title six (VI) of the code. [26 G. A., ch. 1, §§ 6, 7, 12.] [27 G. A., ch. 23, § 4.] [28 G. A., ch. 25, § 1.] [29 G. A., ch. 39, § 1.] [29 G. A., ch. 41, § 1.]

**SEC. 747-b. Special charter and first class cities.** All the provisions of this act shall be held and construed as applying to cities of the first class and to cities acting under special charters. [29 G. A., ch. 41, § 2.]

**SEC. 748. Powers—water works fund—how disbursed.** The said board of trustees shall have the power to carry into execution the contract or contracts for the purchase or erection of such water works, and to employ a superintendent and such other employes as may be necessary and proper for the operation of such works, for the collection of water rentals, and for the conduct of the business incident to the operation thereof. The said board of trustees shall require of the superintendent, and of the other employes as they may deem proper, good and sufficient bonds, the amount thereof to be fixed and approved by said board, for the faithful performance of their duty, such bonds to run in the name of the city and to be filed with the city treasurer and kept in his office. All money collected by the board of water works trustees shall be deposited at least weekly by them, with the city treasurer; and all money so deposited and all tax money received by the city treasurer from any source, levied and collected for and on account of the water works, shall be kept by the city treasurer as a separate and distinct fund. The city treasurer shall be liable on his official bond for such funds the same as for other funds received by him as such treasurer. Such moneys shall be paid out by the city treasurer only on the written order of the board of water works trustees, who shall have full and absolute control of the application and disbursement thereof for the purposes prescribed by law, including the payment of all indebtedness arising in the construction of such works, and the maintenance, operation, and extension thereof. [26 G. A., ch. 1, §§ 8, 9.] [28 G. A., ch. 25, § 2.] [29 G. A., ch. 39, § 1.] [29 G. A., ch. 161, § 1.]

**SEC. 748-a. Special charter cities.** That the provisions of said section, as amended, shall be applicable to cities under special charters. [29 G. A., ch. 161, § 2.]

**SEC. 748-b. Special charter cities.** That chapter twenty-five (25), of the acts of the twenty-eighth (28) general assembly, relating to water works, be and the same is hereby made applicable to cities under special charters. [29 G. A., ch. 162, § 1.]

[The latter portion of section 748 beginning with the words "all money collected" is section 2 of chapter 25 acts of 28th G. A. Section 1 of the same chapter amended section 747 of the code which is now repealed.—Ed.]

## CHAPTER 6.

## OF STREETS AND PUBLIC GROUNDS.

## SECTION 751. Establishment—improvements.

[For earlier annotations, see code, pages 310-312.—Ed.]

**Laying out and changing.** In an incorporated town the county board of supervisors has no authority to lay out a public highway. *Philbrick v. University Place*, 106-352.

A city may by ordinance changing the course of a street give to an abutting proprietor the title to a portion thereof. *Ottumwa Brick & Const. Co. v. Ainley*, 109-386.

**Dedication and acceptance.** The provision of § 527 of Code of '73, that no street dedicated to public use in any city shall be deemed public unless accepted by ordinance is intended for the protection of a city from liability for not keeping such street in good condition. It has reference only to streets and alleys which are dedicated by the land owner and not to such as are acquired by the city by purchase or by prescription, and in the latter case no acceptance by ordinance is necessary. It seems that such provision is applicable to cities only and not to towns. *Burlington, C. R. & N. R. Co. v. Columbus Junction*, 104-110.

Where a strip of land has been dedicated and accepted for a street, and occupied by the public as such, the act of the city in levying taxes thereon will not estop it from asserting its right thereto as a street. *Hanger v. Des Moines*, 109-480.

Acceptance of an alley under a common law dedication may be shown by other acts than the adoption of a formal notice. It may be inferred from public use, or other acts indicative of an intention on the part of the city to treat it as a public alley. *Keokuk v. Cosgrove*, 89 N. W., 983.

**Vacation.** The validity of proceedings to

## SEC. 753. Supervision—repair.

[For earlier annotations, see code, pages 312-321.—Ed.]

**Supervision.** The statute of limitations will not run to defeat the city in the exercise of its governmental authority with reference to streets. *Chicago, R. I. & P. R. Co. v. Council Bluffs*, 109-425.

**Liability for defects.** A city is not an insurer against all accidents on its streets, and is responsible only when it fails to use reasonable care to keep its streets in reasonably safe condition for public travel. But if it fails in this, and injury results, not due to want of ordinary care on the part of the person injured, the city is responsible. So held where an injury resulted by reason of a horse becoming unmanageable through fright, and throwing the vehicle over the edge of an embank-

ment, which was not as wide as required by law. *Harvey v. Clarinda*, 111-528.

**vacate a street** should be tested by certiorari and not by an equitable action to restrain. *McLachlan v. Gray*, 105-259.

The general assembly has plenary power over streets and may vacate or discontinue the public easement in them and may invest municipal corporations with this authority. *Ibid.*

While the power to vacate is not arbitrary, and must be exercised only for some public purpose, yet in a proper case it is not unlawful for the city to vacate a street for the use of a railroad company for depot purposes. So held where a street was vacated for such purpose on conditions in behalf of the city imposed on the railroad company. *Spitzer v. Runyan*, 113-619.

As to vacation of a street by act of the owner in vacating a plat, see notes to § 919.

**Improvements.** A city whose finances will admit of doing so may pay for street improvements out of the general fund, or it may guarantee such payment. *Ottumwa Brick & Const. Co. v. Ainley*, 109-386.

The right to construct sewers to carry off the surface water and filth is usually regarded as incident to the power of maintaining the streets, but there is no provision for the construction of sewers through private property within incorporated towns, though the power to condemn for this purpose is conferred upon cities. *Aldrich v. Paine*, 106-461.

The insertion in a contract for street paving of a stipulation that it shall be kept in repair for a specified period is not invalid as in violation of the provision that repairs shall be paid out of the general fund. *Allen v. Davenport*, 107-90.

A municipal corporation is liable for defects and obstructions in a street, left in its natural condition, which has been opened to public use. If used for the ordinary purposes of a street, it is the duty of the corporation to keep it in reasonably safe condition for that purpose. *Lamb v. Cedar Rapids*, 108-629.

Where the excavating of a street is done by a person with the knowledge of the city, it is liable for injuries resulting from

a defective condition of the street due to such excavating. *Keyes v. Cedar Falls*, 107-509.

The city is liable for the unlawful grading of streets in front of the premises of a complaining owner, and where such grading was done by the street commissioner, with the knowledge of the council, held that authority of the officer to act would be presumed and his wrongful acts would be charged to the city. *Brown v. Webster City*, 88 N. W., 1070.

When a defect has existed for such a length of time that the officers of the city should have discovered the defect, if they had exercised ordinary care and diligence, then the law presumes notice to them, whether the defect has been reported to them or not, and whether they actually knew it or not. *Wilberding v. Dubuque*, 111-484.

One who, without negligence on his part, is injured by stepping into a hole in the portion of the street used for a driveway, is entitled to recover if the city is negligent in that respect. *Finnegan v. Sioux City*, 112-232.

It is not contributory negligence to walk in the driveway. *Ibid.*

The street includes the bridges located therein. *Sachs v. Sioux City*, 109-224.

**Use of sidewalks.** An ordinance prohibiting the use on sidewalks of "all varieties of vehicles known by the general term 'bicycle,'" does not apply to tricycles. *Wheeler v. Boone*, 108-235.

Persons who have a right to ride on sidewalks in vehicles which may properly be used thereon may rely, as footmen may, on the sidewalks being in suitable condition for people to walk over, and have the same rights in case of injuries resulting from neglect. *Ibid.*

**Defective sidewalks.** The duty to keep sidewalks in repair being mandatory and not discretionary, the city is liable for injuries received by reason of the defective condition of a sidewalk due to the negligence of the city. *Parmenter v. Marion*, 113-297.

A platform projecting over the sidewalk from the second story of a building is not necessarily a nuisance, and held that the city was not liable for the wrongful act of the owner of such building in throwing a bale of hay from the platform to the street without proper care as to the safety of persons who might be below. *Ibid.*

It cannot be said as a matter of law that an obstruction in a sidewalk or street crossing two inches high cannot be such defect that the city or town in which it exists may be liable for injuries which it causes. The liability in such case does not necessarily depend upon the size of the defect, but upon the effects which may reasonably be apprehended from it upon persons who use the walk or crossing in a particular manner. *Baxter v. Cedar Rapids*, 103-599.

It cannot be said as a matter of law that a town is, because of the smallness of its population, not liable for defects in sidewalks. *Graham v. Oxford*, 105-705.

Where a sidewalk is constructed by a city not in accordance with a general plan or grade, but as a temporary expedient, it is liable for damages resulting from such plan of construction as renders it unsafe, and it is competent to show that it was so sloping as to be dangerous and also to show that it lacked appurtenances which were required to make it safe. *Ford v. Des Moines*, 106-94.

While it may be that the city will not be liable for defects in the sidewalk resulting from the adoption of a plan prepared by a competent engineer, and in accordance with which the work is done, yet it cannot make this defense where the plan of the sidewalk is left entirely to the direction or discretion of the city engineer. If the design is left to the whim or fancy of a single individual it cannot be said that the sidewalk is constructed in accordance with a plan, within the meaning of such rule. *Hodges v. Waterloo*, 109-444.

**Snow and ice.** The fact that walks are made slippery by melting snow is a fact of common knowledge and should be taken into account by the city in constructing walks, especially those which have sloping surfaces and in consequence are liable to be dangerous when slippery. *Ford v. Des Moines*, 106-94.

A city is not relieved from liability for a defect in a sidewalk which causes an injury because of the icy condition of the walk which contributes to the accident. If the walk, by reason of its defective construction, or by reason of previous snow or ice thereon, which should not have been allowed to remain, is dangerous to pedestrians under the prevailing climatic conditions, then the city is liable. *Hodges v. Waterloo*, 109-444.

Even though the fall of a person on a sidewalk is caused in some part by snow thereon, if it is caused also in part by a dangerous slant in the walk the corporation may be liable. *Sylvester v. Casey*, 110-256.

Whether, under all the circumstances, it was negligence in the city not to anticipate the dangerous condition of a walk, due to water running thereon and freezing, and in not providing against such danger, is a question for the jury. *Shumway v. Burlington*, 108-424.

**Notice.** Whether, in view of the continuous bad condition of a sidewalk, the city is chargeable with notice of defects therein, is for the jury. *Bailey v. Centerville*, 108-20.

Constructive notice to the city of defective condition of a walk is not to be founded upon the condition of the particular plank causing the injury. The general

condition at such point may be considered. *Hoover v. Mapleton*, 110-571.

For the purpose of showing notice to the city, witnesses may testify as to their having tripped and fallen over the same defect in the sidewalk prior to the injury for which plaintiff seeks to recover. *Wilberding v. Dubuque*, 111-484.

Evidence in a particular case held sufficient to show knowledge by the city of the defective condition of the sidewalk. *Beaver v. Eagle Grove*, 89 N. W., 1100.

Evidence in a particular case held sufficient to charge the town with notice of the defective condition of the sidewalk in question. *Hoover v. Mapleton*, 110-571.

Evidence of the defective condition of the sidewalk some distance from the place of the accident is admissible where it appears that the entire walk was out of repair and in a dangerous condition. *Bailey v. Centerville*, 108-20.

Where the question is whether a walk was defective, an ordinance of the city regulating the laying of walks, and passed prior to the construction of the walk in question, may be introduced in evidence as bearing on the question whether the walk as constructed was sufficient. *Shumway v. Burlington*, 108-424.

Evidence that a walk, as it existed at the time of the accident, has subsequently been taken out, may be introduced as showing how witnesses knew the condition of the walk, where it is not attempted thereby to prove an admission that the walk was defective. *Frohs v. Dubuque*, 109-219.

Evidence as to the original construction of a walk may be admissible to show, not that it was originally defective, but as bearing upon the question of notice to the city as to its condition. *Ibid.*

Evidence that another person tripped upon the same loose board a few days before the accident is admissible, where such evidence is not relied upon as substantive proof of the actionable defect, but to show the existence of this particular loose board prior to the injury, and the manner in which it was discovered by the witness. *Ibid.*

Where the city offers evidence tending to show that the sidewalk was in good repair before, at and after the time of the injury complained of, the plaintiff may prove that repairs have been made at and near the place in question after the accident. *Parker v. Ottumwa*, 113-649.

For witnesses to state that a walk was defective is to announce a conclusion, and therefore such testimony is not admissible, but the witness may say that the walk was sound and in good condition, as it would be impossible to describe absence of defects which did not exist. *Brooks v. Sioux City*, 114-641.

The question whether an accident on a sidewalk was due to a crossing which projected about one inch and a half above

the general level of the walk, or to the absence of guard rails on an adjoining portion of the walk, which was four or five feet from the ground, held properly left to the jury. *Bridgeman v. Missouri Valley*, 88 N. W., 1069.

Where plaintiff contends that the entire walk was out of repair, testimony as to prior accidents happening on the same walk is admissible, although they appear not to have occurred at the same place on the walk. *Yeaker v. Spirit Lake*, 88 N. W., 1095.

Evidence as to the condition of the walk, and repairs thereto prior to the time of the accident is admissible for the purpose of showing knowledge of its condition on the part of the city. *Ibid.*

Evidence considered as tending to show negligence of the city in the construction and maintenance of the walk causing injury to the plaintiff. *Goucher v. Sioux City*, 89 N. W., 24.

**Contributory negligence.** One who has full knowledge of a defect in a sidewalk, and afterwards without necessity passes over the place where such defect exists without any precaution or excuse for want of precaution, is guilty of such contributory negligence with reference to a resulting injury as to defeat recovery. *Barce v. Shevandoah*, 106-426; *Marshall v. Belle Plaine*, 106-508.

An instruction that a person in passing along a public street is required to use more caution and be more watchful when it is dark than in the day time may be proper but will not be necessary under all circumstances. *Baxter v. Cedar Rapids*, 103-599.

Under the facts of a particular case held, that the person injured by defect in a sidewalk had not been guilty of contributory negligence in failing to discover the defect. *Ibid.*

It is not negligent for a person to pass over streets or sidewalks of a city at night. A person has the right to rely upon the assumption that the city has done its duty in keeping the streets in order. *Keyes v. Cedar Falls*, 109-509.

While in some cases the nature of the defect in the sidewalk may suggest that a person going upon the walk with knowledge of the defect will be deemed as matter of law guilty of contributory negligence, yet in general it must appear that the person using the walk regarded it as dangerous, or considered it to be imprudent to go upon it at the time he did. *Sylvester v. Casey*, 110-256.

Intoxication does not in itself constitute contributory negligence on the part of a person injured on a sidewalk, unless the evidence shows that his intoxication in some way aided in bringing about the injury, or it appears that it was negligent for him to be on the walk in an intoxicated condition. *Ibid.*

It is error to charge that if plaintiff

knew the walk to be unsafe he was required to use more than ordinary care in passing over it. *Hoover v. Mapleton*, 110-571.

In such case the court may leave it to the jury to say whether there was contributory negligence in passing over the walk, known to be dangerous, where it is shown that there was another and a convenient way by which the plaintiff might have proceeded to his destination. *Ibid.*

One who knows a walk to be unsafe, and that it is imprudent to attempt to pass over it, is guilty of contributory negligence in attempting to do so, but knowledge of unsafe condition is not enough as matter of law to establish contributory negligence. *Yeaker v. Spirit Lake*, 88 N. W., 1095.

It is not true that one who knows of a defect in a walk is necessarily guilty of negligence in attempting to pass over it. Much depends upon the character of the defect, the occasion for passing over it and the care used in doing so. If a person knows of a defect in a walk, but believes that it can be passed in safety with the exercise of ordinary care and is justified as a reasonably prudent man in holding that belief he is not negligent in attempting to pass over it in an ordinarily careful manner. *Graham v. Oxford*, 105-705.

It does not necessarily constitute contributory negligence to use a defective street, although the person using it has knowledge of the defect and there is another reasonably convenient way by which such person might reach his destination. *Harvey v. Clarinda*, 111-528.

It is not negligence, as matter of law, for one to pass over a defective sidewalk. Whether or not it is imprudent for plaintiff to pass over a sidewalk in a defective condition is for the jury. *Cox v. Des Moines*, 112-646.

One who passes over a defective walk with reasonable care under the circumstances is not guilty of contributory negligence, although charged with knowledge that the walk is defective. *Bailey v. Centerville*, 88 N. W., 379.

One who is injured in passing over a defective sidewalk is not guilty of contributory negligence if he exercised the care an ordinarily prudent person would exercise in passing over the walk. *Rush v. Dubuque*, 90 N. W., 80.

It is not negligence to cross a street in a diagonal direction and step upon a sidewalk at a place which is not a street crossing. *Bell v. Clarion*, 113-126; *Bell v. Clarion*, 88 N. W., 824.

#### SEC. 757. Care, construction and repair of bridges.

[For earlier annotations, see code, page 322. —Ed.]

A bridge is a part of the street in which it is situated. *Sachs v. Sioux City*, 109-224.

#### SEC. 759. Aiding county bridge.

[For earlier annotations, see code, page 323 —Ed.]

Under these provisions aid may be given to a toll bridge. *Pritchard v. Magoun*, 109-364.

#### SEC. 760. Question submitted.

Prior to the adoption of the present Code it was not required that the ballots at a special election, such as here contemplated, should be in accordance with the Australian ballot law. *Pritchard v. Magoun*, 109-364.

Also held that notices of such election posted in hotels were posted in public places, as required by the statute. *Ibid.*

**SEC. 766-a. Additional tax.** That any city in this state which has voted aid to any company for the construction of a highway or combination bridge across any navigable boundary river of this state; a condition of which vote, or the granting or acceptance of such aid, was that the city should have the right to purchase such bridge from the company so aided, its successors or assigns; may, at any time after such taxes voted in aid are collected, vote an additional tax of not exceeding five per centum of the assessed value of the taxable property of such city for the purpose of securing the funds necessary to enable it to make such purchase. Such taxes shall be payable in such annual installments not less than ten as the electors may determine. [29 G. A., ch. 42, § 1.]

**SEC. 766-b. Question submitted.** The question of whether or not such additional taxes shall be voted shall be submitted to the electors of such city before the city elects to make such purchase and the submission thereof shall be governed in all respects by sections seven hundred sixty (760), seven hundred sixty-one (761), seven hundred sixty-two (762), seven hundred sixty-

three (763) and seven hundred sixty-four (764) of the code so far as the same are applicable. [29 G. A., ch. 42, § 2.]

**SEC. 766-c. Bonds or warrants—tolls.** After such taxes are voted the city may issue its bonds, warrants or other certificates drawing such interest not exceeding six per cent. per annum as the city council may determine, payable from such taxes as they are collected, and from no other source, and pledging them for their payment. Such taxes shall be used for no other purpose and such bonds, warrants or certificates shall not be sold for less than their par or face value with accrued interest. The city council shall fix the rate of tolls or charges for passing over the bridge, and such tolls shall be large enough to pay the interest upon the bonds, warrants or certificates issued for its purchase together with the expense of maintaining and operating it. [29 G. A., ch. 42, § 3.]

**SEC. 766-d. Vote of tax in cities after annexation.** In any case where aid has been extended and bridges erected in two separate cities and subsequent thereto, one of such cities has been annexed to the other, the electors residing in the territory which comprise either of the separate cities before annexation, may vote taxes upon the property in such territory for the purchase of such bridge, and the proceedings in such case shall be the same as in the preceding sections of this act provided, except that the petition to the city council shall be signed by a majority of the resident freehold taxpayers of the territory in which the vote is to be had, and the taxes, when voted and properly certified, shall be levied only upon the property in such territory. [29 G. A., ch. 42, § 4.]

**SEC. 767. Railway tracks—street railways.**

[For earlier annotations, see code, pages 324-7.—Ed.]

An ordinary use of the street by a railway operated by trolley wires carried upon poles set at the side of the street is not a new or additional burden upon the public easement in a street entitling the abutting property owner to additional damages even though he is the owner of the fee. *Snyder v. Ft. Madison Street R. Co.*, 105-284.

A railroad company may acquire a right of way over private property and across streets of a city with its tracks in the occupation of such right of way without securing the consent of property owners, if in crossing the streets it does not construct its line in front of abutting property. *Morgan v. Des Moines Union R. Co.*, 113-561.

The owner of abutting property upon a street may recover damages against a railroad company for obstructing the street by an embankment, although the track is not laid on the street in front of such

abutting property owner's premises. *Dairy v. Iowa Cent. R. Co.*, 113-716.

A city may condemn land for a public landing and grant a railway company a right of way over the same. *Diamond Jo Line Steamers v. Davenport*, 114-432.

Where land is dedicated to a city for public highway and other public purposes, the city may permit its use by a railway for the purpose of facilitating the business of such railway. *Burlington Gas Light Co. v. Burlington, C. R. & N. R. Co.*, 165 U. S., 370.

It is the duty of a street railway company to so construct and operate its railway as not to interfere unnecessarily with the right of abutting property owners to use and enjoy their property and it may be enjoined from maintaining a trolley pole in front of a dwelling house of plaintiff without necessity therefor in a manner to annoy him and injure and depreciate the value of his property. *Snyder v. Fort Madison Street R. Co.*, 105-284.

**SEC. 771. Assessment of damages.** When a viaduct shall be by ordinance declared necessary for the safety and protection of the public, the council shall provide for appraising, assessing and determining the damages which may be caused to any property by reason of the construction of the same and its approaches. The proceedings for such purpose shall be the same as are provided in case of taking private property for works of internal improvement, and the damages assessed shall be paid by the city out of the general bridge fund, or in cities having a population of fifty thousand or over from any other fund or funds legally available therefor. [22 G. A., ch. 32, § 2.] [29 G. A., ch. 43, § 1.]

**SEC. 773. Apportionment of cost—use of—compensation for—repairs.** When two or more railroad companies own or operate separate lines of track to be crossed by a viaduct, the proportion thereof, and the approaches thereto to be constructed by each, or the cost to be borne by each, shall be determined by the council. The council shall fix a time and place where it will consider such matters and any objections that may be made to the construction of such viaduct and the approaches thereto. Not less than twenty days written notice of such hearing shall be given to the company or companies owning or operating the track or tracks over or under which it is proposed to construct such viaduct. Said notice may be served in the same manner and upon the same persons or officers as in the case of an original notice. Such cities shall have power to regulate the use of such viaducts and to authorize or forbid the use thereof by street railway companies and to require the payment of compensation for such use. After the completion thereof, any revenue derived therefrom by the crossing thereon of street railway lines shall constitute a special fund, and shall be applied in making repairs to such viaduct. One-half of all ordinary repairs to such viaduct or its approaches shall be paid out of such fund, or be borne by the city, and the remaining half by the railroad company; and if the track of more than one company is crossed, the costs of such repairs shall be borne by such companies in the same proportion as was the original cost of construction. [Same, § 4.] [29 G. A., ch. 43, § 2.]

**SEC. 774. Refusal to comply.** If any railroad company neglects or refuses, for more than thirty days after such notice as may be prescribed by ordinance, to comply with the requirements of any ordinance passed under the provisions of this chapter, the city may enforce the construction, maintenance or repair of such viaduct and approaches by proceedings in mandamus and the court shall require the issues to be made up at the first term to which such action is brought and shall give the same precedence over other civil business. Refusals to comply with, or violations of, the orders of the court in such proceedings may be punished as contempts, by fine and imprisonment as provided in section two thousand one hundred and nineteen (2119) of the code; or the city may construct or repair the viaduct or approaches, or any portion thereof, which such railroad company was required to construct or maintain, and recover the cost thereof from such company. [Same, § 6.] [29 G. A., ch. 43, § 3.]

**SEC. 777. Temporary sidewalks.** They shall have power to provide for the laying, relaying and repairing of temporary sidewalks upon any street, avenue, public ground, wharf, landing or market place within the limits of such city or town, at a cost not exceeding forty cents a linear foot, to prescribe a uniform width thereof, and to regulate the grade of the same, and to provide for the assessment of the cost thereof on the property in front of which the same shall be laid, in proportion to the special benefits conferred upon the property thereby and not in excess thereof, and the city or town clerk shall certify the amount of such assessment to the county auditor, and it shall be collected the same as other taxes. [C. '73, § 468.] [28 G. A., ch. 26, § 1.]

Where an ordinance provides for ordering the construction of temporary sidewalks at the expense of the abutting property owners upon resolutions of the council, a notice of such order and service of notice of the resolution is necessary before the assessment can be enforced. *Hawley v. Fort Dodge*, 103-573.

Where no permanent grade is established the council cannot require the construction of a temporary plank sidewalk above the natural surface so as to bring it on a line with improvements on the street. *Hartrick v. Farmington*, 108-31.

**SEC. 777-a. Special charter cities.** The provisions of this act are also made applicable to cities acting under special charters. [28 G. A., ch. 26, § 2.]

[Section 777-a is section 2 of chapter 26 of the acts of the 28th G. A. Section 1 of the same chapter amended section 777 of the code, by striking out the word "plank" in the second line of said section, and inserting the clause "in proportion to the special benefits conferred upon the property thereby and not in excess thereof," near the end of said section —Ed.]

**SEC. 779. Permanent sidewalks—city clerk to certify assessment—special tax.** They shall have power to provide for the construction, reconstruction and repair of permanent sidewalks upon any street, highway, avenue, public ground, wharf, landing or market place within the limits of such city or town; but the construction of permanent sidewalks shall not be made until the bed of the same shall have been graded so that, when completed, such sidewalks will be at the established grade; and to assess the cost thereof on the lots or parcels of land in front of which the same shall be constructed; and the city clerk shall certify the amount of such assessment to the county auditor, and it shall be collected the same as other taxes. But, in cities having a city collector or treasurer who collects city taxes, the city clerk shall certify the amount of such assessment to such collector or treasurer, and the same shall be collected as other city taxes. Towns shall have the power to make the street improvements provided for in chapter seven of this title, and pay for the same, or any part thereof, out of the general fund, or to assess, levy and collect special taxes for the cost, or any part thereof, against the abutting property, in the manner provided in the said chapter. But unless the owners of a majority of the linear feet of the property fronting on the improvements referred to in this section petition the council therefor, the same shall not be made unless three-fourths of all the members of the council shall by vote order the making thereof. [20 G. A., ch. 20, § 1; C. '73, § 466.] [28 G. A., ch. 27, § 1.]

[For earlier annotations, see code, page 330 —Ed ]

In exercising the taxing power the city must pursue the manner pointed out in the statute, and if assessment is made for the reconstruction of a sidewalk, and not merely for repair, then it must be based upon petition of the owners of the majority of the frontage. *Farraher v. Keokuk*, 111-310.

#### **SEC. 780. Repair of sidewalks.**

Repairs without notice can be assessed to abutting property, but not the expense of reconstruction unless the provisions of the preceding section are complied with. *Farraher v. Keokuk*, 111-310.

#### **SEC. 782. Grades and grading.**

[For earlier annotations, see code, pages 330-1.—Ed.]

The city is liable to an abutting property owner for damage to his property from cutting down a street on which no grade has been established. *Millard v. Webster City*, 113-220.

As a general rule a city is not liable for damages occasioned by the mere grading of a street, if this is done in a prudent manner, but the city will not be permitted to divert a large quantity of surface water from its natural course in another direc-

tion so as to flow on a lot owner's land in destructive quantities through a drain or channel. *Hoffman v. Muscatine*, 113-332.

Where an abutting property owner is damaged by the unlawful grading of a street, the city is liable if the grading is done by its authority, and where done by the street commissioner, with knowledge of the city council, and without objection by the council, authority will be presumed. *Brown v. Webster City*, 88 N. W., 1070.

#### **SEC. 785. Change of grade—damages.**

[For earlier annotations see code, pages 332-3.—Ed.]

The grade of a street can neither be established nor changed save by ordinance. The city can acquire no rights as against

a property owner by virtue of a change of grade claimed to arise by implication only. *Morton v. Burlington* 106-50.

That plaintiff's property was made more difficult of access, and that a retaining wall was rendered necessary and that certain shade trees in the street, not obstructing travel, were injured or destroyed, held elements of damage for which recovery could be had under this section. *Richardson v. Webster City*, 111-427.

Where the work was done by the street commissioner, extending over a period of about six weeks, and the city disposed of some of the dirt taken from the excavation, held that there was sufficient evidence *prima facie* to show that the change was by the authority of the city. *Ibid.*

A witness should not be asked to state how much less in value the premises were worth after the change than before. *Ibid.*

Mere adoption of an ordinance changing the grade gives no right of action to a property owner, and if the city proceeds

to change the grade to some extent, without making the complete change necessary to conform the street to the established grade, the property owner can only recover damages resulting from such actual change. *Buser v. Cedar Rapids*, 87 N. W., 504.

One who improves his property with reference to the natural grade of the street, which does not conform to the grade established by ordinance, cannot recover damages occasioned by the act of the city in bringing the street to the established grade. *Farmer v. Cedar Rapids*, 89 N. W., 1105.

If the land of the abutting owner is in fact benefited by the change of grade which improves the means of access to his property, that fact may be considered in fixing the amount of damages to be recovered for such change of grade. *Morton v. Burlington*, 106-50.

### SEC. 788. Assessment.

[Attention is called to section 792-a, *infra*, and note following said section.—Ed.]

## CHAPTER 7.

### OF STREET IMPROVEMENTS, SEWERS AND SPECIAL ASSESSMENTS.

#### SECTION 792. Assessing costs of improvements.

[For earlier annotations, see code, pages 335-6.—Ed.]

The term "paved", as applied to streets, avenues and highways refers to the laying of some hard substance upon the earth so as to make a finished surface for travel, and does not apply to the re-flooring of a bridge. *Cedar Rapids v. Cedar Rapids & Marion City R. Co.*, 108-406.

While permanent paving is not to be done until after the bed of the street shall have been brought so near to the grade as established by ordinance as that paving when fully completed shall bring the street fully up to the established grade, and the cost of grading is not to be assessed as part of the improvement; yet if the grade is established at such time as that the improvement may be made with reference thereto it is sufficient. *Allen v. Davenport*, 107-90.

The right of the municipality to levy special assessments depends on statutory enactment, and has no existence unless there be a valid statute conferring it. General authority to levy taxes for municipal purposes is not sufficient to confer the power, and the statute which does confer it is to be strictly construed in favor of the person against whom the assessment is levied. When express power is given, however, substantial compliance with the statute is all that is required. *Chicago, R. I. & P. R. Co. v. Ottumwa*, 112-300.

The whole theory of special assessments is based on the doctrine that the property

against which they are levied derives some special benefit from the improvement. *Ibid.*

A mere easement is not a lot, nor a parcel of land, within the terms of this section, and therefore held that a railroad was not subject to special assessment for improvement of a street abutting its right of way. It would be otherwise as to property of the company used for warehouses, depots, or other like purposes. *Ibid.*

Under prior statutes it has been held that a special assessment cannot be enforced against lots which do not abut upon the improvement. *Smith v. Des Moines*, 106-590.

The front foot rule of assessment without regard to benefits is recognized in this state. *Allen v. Davenport*, 107-90.

A provision requiring the city council to ascertain the entire cost of the improvement, and what portion may be assessable on adjacent property, and to assess such portion as provided by law or ordinance, does not violate the Fourteenth Amendment to the federal constitution. *Burlington Sav. Bank v. Clinton*, 106 Fed., 269.

A conveyance which is but an artifice, and not effectual to transfer title will not relieve the property owner from liability for special assessments. *Ransom v. Burlington*, 111-77.

An assessment certificate becomes affected in the hands of a holder with the terms of the law and ordinances under which it is issued, and also with any agreement of the property owner made in pursuance of such ordinances, fixing the time of payment of the assessments. *Talcott v. Noell*, 107-470.

A city may by contract render itself liable on implied guaranty for the costs of an improvement in front of property, not subject to the assessment, or which is of such value that the lien of the tax thereon cannot be successfully enforced. *Ottumwa Brick & Const. Co. v. Ainley*, 109-386.

And where the city by reason of its

own fault issues certificates for such costs which are invalid, it is liable to the contractor for the amount thereof. *Fort Dodge Electric L. Co. v. Fort Dodge*, 89 N. W., 7.

The expense of paving in front of a court house square may be assessed against the county. *Edwards & Walsh Const. Co. v. Jasper County*, 90 N. W., 1006.

Under prior statutes authorizing collection of the assessment by equitable proceedings, held that the city might proceed in equity although the taxes had been certified to the county treasurer and the necessary steps had been taken for the sale of the property for the tax. *Smith v. Des Moines*, 106-590.

**SEC. 792-a. Special assessment—rate.** When any city or town council or board of public works levies any special assessment for any public improvement against any lot or tract of land, such special assessment shall be in proportion to the special benefits conferred upon the property thereby and not in excess of such benefits. Such assessment shall not exceed twenty-five per centum of the actual value of the lot or tract at the time of levy, and the last preceding assessment roll shall be taken as *prima facie* evidence of such value. [28 G. A., ch. 29, § 1.]

[By the title of the act (chapter 29, 28th G. A.), the act seems to have been intended as amendatory of chapters 7 and 8 of the code, only, while the wording of the above section would seem to include any special assessment for any public improvement.—Ed.]

**SEC. 792-b. Deficiencies—how paid.** If the special assessment which may be levied against any lot or tract of land shall be insufficient to pay the cost of the improvement, the deficiency shall be paid out of the general fund, or for sewers out of the sewer fund provided for in section eight hundred and thirty-one (831), or subdivision three (3) of section eight hundred and ninety-four (894), or section nine hundred and seventy-eight (978), or subdivision three (3) of section ten hundred and five (1005), or for other improvements out of the improvement fund provided for in section eight hundred and thirty (830), or subdivision two (2) of section eight hundred and ninety-four (894), or section nine hundred and seventy-seven (977), or subdivision two (2) of section ten hundred and five (1005) of the code, and acts amendatory thereof as the case may be. If there be property against which no special assessment can be levied the proportion of the cost of the improvement which might otherwise be assessed against such property shall be paid in like manner. [28 G. A., ch. 29, § 2.]

**SEC. 792-c. What statutes govern.** So far as applicable, sections eight hundred and twenty-one (821), eight hundred and twenty-two (822), eight hundred and twenty-three (823), eight hundred and twenty-four (824), eight hundred and twenty-nine (829), and eight hundred and thirty-nine (839) of the code shall govern all special assessments made in cities and towns unless otherwise specially provided. Upon appeal the court shall determine all questions, including that of benefits to the property assessed. [28 G. A., ch. 29, § 3.]

**SEC. 792-d. Enforcement of certain statutes not affected.** Nothing in this act shall be construed to interfere with the enforcement of the provisions of sections eight hundred and thirty-four (834) and eight hundred and thirty-five (835), of the code. [28 G. A., ch. 29, § 4.]

**SEC. 792-e. Special charter cities.** This act shall apply to cities acting under special charter. [28 G. A., ch. 29, § 5.]

**SEC. 794. Sewers.**

[For earlier annotations, see code, page 337.—Ed.]

A sewer is usually closed but not necessarily so, and the term is usually applied to drains in a city, whether for water or filth or both; but there is no provision for the construction of sewers through private property within incorporated towns, though the power to condemn for this purpose is conferred on cities. *Aldrich v. Paine*, 106-461.

The authority of a board of supervisors under Code § 1939 to provide for the construction of ditches or drains within the county extends to cities and towns, and a county ditch may properly be constructed and the cost thereof assessed to abutting

property through the limits of an incorporated town. *Ibid.*

A temporary gutter for surface drainage may be constructed in the street without the passage of a special ordinance authorizing it, and without compliance with the provisions as to sewers. Even if a resolution for such improvement should be necessary, the acceptance of the work by the city would be a ratification of the act of the street commissioner in constructing it without such resolution. If such drain or gutter is negligently constructed, one injured thereby may recover damages in an action, but is not entitled to have it abated as a nuisance. *Cooper v. Cedar Rapids*, 112-367.

**SEC. 797. Changing water courses.**

Where a city in the exercise of statutory authority has fixed the channel of a water course through which surface water flows, a property owner has no right by filling his lot and obstructing such channel to throw such surface water out of the

course thus fixed. *Waverly v. Page*, 74 N. W., 938.

The power to change a water course is not conferred on incorporated towns. *Aldrich v. Paine*, 106-461.

**SEC. 799. Question submitted—special election.** If the council on receiving the plans, specifications, and estimate of the expenses to be incurred, referred to in the last preceding section, shall still be of the opinion that the work should be done as proposed, it shall call a special election of the entire city or of any sewer district thereof in which the proposed work is to be done to finally determine the same question, and also the question of levying a special tax upon the property of the city or such sewer district, in addition to all other taxes now provided for by law, for that purpose. If the council shall determine that the estimated cost is greater than should be levied and collected in a single year, it may fix the yearly proportion, and determine in what years the same shall be levied and collected, and provide by ordinance or resolution the time of submitting the question to a vote. [23 G. A., ch. 6, § 3.] [28 G. A., ch. 28, § 1.]

**SEC. 801. Damages assessed.**

It is immaterial that the assessment names the property upon which it is as-

essed as belonging to an owner deceased. *Smith v. Des Moines*, 106-590.

**SEC. 810. Street improvements and sewers—preliminary notice.**

[For earlier annotations, see code, pages 340-1.—Ed.]

Establishment of the grade prior to the resolution providing for the improvement is not jurisdictional, and if the grade is established at such time that the improvement may be made with reference thereto it is sufficient. *Allen v. Davenport*, 107-90.

While cost of grading cannot be as-

essed as part of the street improvement, yet a reasonable amount of excavating in order to prepare the surface of the street for the finished improvement may be charged as part of the cost of paving. *Ibid.*

The published notice in a particular case held sufficient. *Arnold v. Fort Dodge*, 111-152.

**SEC. 812. Contract.**

The acceptance of curbing under a contract is vitiated by proof of fraud of the contractor in not using the amount of cement required by the contract, whereby the work done is inferior to that contracted for, and such fraud will not be waived by

the action of the city authorities in accepting the curbing. *Mason v. Des Moines*, 108-658.

The fact that the contract for the work requires that all the laborers employed shall be citizens of the city does not

constitute such invalidity as to defeat recovery by the contractor after the work has been performed and accepted. *Ed-*

*wards & Walsh Const. Co. v. Jasper County*, 90 N. W., 1006.

### SEC. 813. Bids.

[For earlier annotations, see code, page 341.—Ed.]

Under statutory provisions requiring improvements to be made by bids advertised for by the board of public works upon plans and specifications furnished by the city engineer, the plans and specifications may be sufficient, although they are not as full and complete as they might possibly be made. *Jenney v. Des Moines*, 103-347.

Where the publication of the notice for bids did not state at what time the bids would be acted on and when the work should be done and the contract as let fixed a different date for the completion of the work from that referred to in the ordinance under which the improvement was to be made, held that the contract was invalid. The statutory provisions as to the method of letting such contracts are mandatory. *Osburn v. Lyons*, 104-160.

A stipulation in the contract providing for the maintenance of the improvement in good condition for the term of five years, held not to invalidate the contract, as it was in the nature of a guaranty

and not an independent contract for repairing. *Ibid.*

The fact that property owners knew that the improvements in question were being made and did not object thereto, held, not to constitute an estoppel against them to question the validity of the contract, it not appearing that they had knowledge of the defects therein. *Ibid.*

Where a notice for bids for street improvements did not specify when the work should be done nor at what time the proposals would be acted upon, held, that it was insufficient and the assessments made for such improvement were invalid. *Polk v. McCartney*, 104-567.

Where the city assumes liability to the contractor for the cost of street improvements such liability becomes indebtedness within the constitutional limitation; and the contract will be invalid if the indebtedness thus incurred is in excess of the constitutional limit. *Allen v. Davenport*, 107-90.

**SEC. 814. Contractor's bond to repair.** All contracts for the making or reconstruction of street improvements or sewers may contain a provision obligating the contractor and his bondsmen to keep such improvement or sewer in good repair for not less than one year after the acceptance of the same by the city, and the bond shall be so conditioned as to conform to such contract. [27 G. A., ch. 24, § 1.]

### SEC. 816. Lien of tax.

[For earlier annotations, see code, page 342.—Ed.]

Under 25 G. A., chap. 7, sec. 12, which provided that the assessment should be a lien upon the property abutting upon the street on which the improvement was made, it was held that the cost of street improvements could not be assessed upon a lot not abutting upon the street, no matter how nearly adjoining it might be. *Smith v. Des Moines*, 106-590.

The liens of special assessments take priority in order of time. *Des Moines Brick Mfg. Co. v. Smith*, 108-307.

A conveyance which is but an artifice and not effectual to transfer title will not relieve the property owner from liability for special assessments. *Ransom v. Burlington*, 111-77.

### SEC. 818. Cost of improvements—how paid.

The provisions of this section, authorizing apportionment of the cost on abutting lots, according to their frontage, is not un-

constitutional. *Hackworth v. Ottumwa*, 114-467.

### SEC. 820. Assessment of costs.

[For earlier annotations, see code page 343.—Ed.]

Property owners cannot be heard to complain of a part of the assessment without tendering payment of the portion of the assessment which is valid. *Allen v. Davenport*, 107-90.

It is not until the completion of the work

that the council is required to determine the cost and authorized to assess such cost upon abutting property. It is not contemplated that the assessment be made for the estimated cost. *Sanborn v. Mason City*, 114-189.

### SEC. 821. Plat and schedule.

[See section 792-c, *supra*.—Ed.]

**SEC. 822. Estimates—city engineer.**[See section 792-c, *supra*.—Ed.]

**SEC. 823. Notice of assessment.** After filing the plat and schedule, the council shall give notice by two publications in each of two newspapers published in the city, if there be that number, otherwise in one, and by hand-bills posted in conspicuous places along the line of such street improvement or sewer, that said plat and schedule are on file in the office of the clerk, and that within twenty days after the first publication all objections thereto, or to the prior proceedings, on account of errors, irregularities or inequalities, must be made in writing and filed with the clerk; and the council, having heard such objections and made the necessary corrections, shall then make the special assessments as shown in said plat and schedule, as corrected and approved. [25 G. A., ch. 7, §§ 11, 18; 22 G. A., ch. 5, § 6; 22 G. A., ch. 6, § 5; 21 G. A., ch. 168, §§ 11, 19.] [29 G. A., ch. 44, § 1.]

[Attention is called to section 792-c, *supra*.—Ed.]

[For earlier annotations, see code, page 344.—Ed.]

If the property owner has notice and an opportunity to be heard before the assessment attaches and becomes a lien upon his property, this is all the law requires. *Arnold v. Ft. Dodge*, 111-152.

A property owner who has had notice during the progress of the work of the grade adopted, and in accordance with whose request the grade has been modified,

cannot afterwards complain that the improvement is not in accordance with the established grade. *Ibid*.

Under prior statutory provisions held that a mere mistake in name of the owner to whom notice was directed would not invalidate the assessment. *Chicago, R. I. & P. R. Co. v. Ottumwa*, 112-300.

**SEC. 824. Objections.**[See section 792-c, *supra*.—Ed.]**SEC. 825. Levy of assessment—installments.**

Under the provision by which the owner of the property may by waiving objections to assessments have the right to pay in installments, a lessee is not such owner as to be entitled to file a waiver and thus make the assessment payable in installments. So held where a tenant under obligation to pay all taxes and assessments imposed on the property during the term of the lease attempted by signing a waiver to make the assessment payable in installments and thus escape liability for install-

ments which would under such arrangements not become payable during his term. *Vorse v. Des Moines Marble & Mantel Co.*, 104-541.

The certifying of the assessment to the auditor is not a duty enjoined, but a right conferred, and its exercise is discretionary. *Talcott v. Noell*, 107-470.

A resolution or ordinance making a special assessment may be proven by parol evidence. *Edwards & Walsh Const. Co. v. Jasper County*, 90 N. W., 1006.

**SEC. 829. Sale for assessment.**[See section 792-c, *supra*.—Ed.]

[For earlier annotations, see code, pages 346-7.—Ed.]

Where a special assessment is enforced by action, only six per cent. interest can be collected. *Des Moines Brick Mfg. Co. v. Smith*, 108-307.

Where special assessments are certified for collection, the property owner is not required to pay interest or penalty, except as provided in the special assessment statutes. *Edwards & Walsh Const. Co. v. Jasper County*, 90 N. W., 1006.

One who has paid taxes which he claims to have been unlawfully assessed by the city cannot recover back the money paid, unless it appears that there was no authority to assess the tax, that the money sued for has been actually received by the city, and that the payment was upon compulsion. *Hawkeye L. & B. Co. v. Marion*, 110-468.

**SEC. 831. Levy for sewer fund.**

A district sewer tax is enforceable only against the real property within the sewer district. Therefore it cannot be enforced as against a railroad company which is

taxed under Code § 1336 on its real and personal property collectively. *Chicago, M. & St. P. R. Co. v. Phillips*, 111-377.

**SEC. 833. Assessments not to be diverted.**

A court of equity has jurisdiction to compel a city to perform its duty as trustee to collect and properly apply such assessments. *Vickry v. Sioux City*, 104 Fed., 164.

A city which has issued bonds to be paid for by the collection of special assessments is a trustee, charged with the duty of col-

lecting and applying such assessments, and equity has jurisdiction over a suit by the holder of such bonds to require an accounting in respect to such trust and for the enforcement of the same. *Farson v. Sioux City*, 106 Fed., 278.

**SEC. 834. Assessments on railways and street railways.**

[For earlier annotations, see code, page 348.—Ed.]

This section has reference to assessment of railways and street railways for the improvement of streets occupied by their tracks, and not to assessment of special taxes upon right of way abutting upon the street improvement. *Chicago, R. I. & P. R. Co. v. Ottumwa*, 112-300.

This section is applicable to street improvements undertaken in pursuance of authority conferred by the Code. *Ft. Dodge Elec. L. & P. Co. v. Ft. Dodge*, 89 N. W., 7.

When the contractor has agreed to take certificates in payment of his work in paving a street and the city, having authority to assess the entire amount upon abutting property, improperly issues certificates against the street railway company for a share of the expense, which certificates are invalid, it becomes liable to the contractor for the amount of the invalid certificates. *Ibid.*

**SEC. 836. Re-levy.**

[For earlier annotations, see code, page 349.—Ed.]

An irregularity in an assessment does not affect the jurisdiction of the city in

the proceeding, and may be cured. *Ottumwa Brick & Const. Co. v. Ainley*, 109-336.

**SEC. 839. Appeal.**

[See section 792-c, *supra*.—Ed.]

On the appeal the court has no power to make an entirely new assessment. *Berry v. Des Moines*, 87 N. W., 747.

The provisions of this section are limited to assessment proceedings under the pro-

visions of the Code. *Ft. Dodge Elec. L. & P. Co. v. Ft. Dodge*, 89 N. W., 7.

Where the assessment is made without any authority, then the property owner can enjoin the enforcement of the assessment without resorting to the remedy by appeal. *Ibid.*

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## CHAPTER 8.

### OF STREET IMPROVEMENT AND SEWER BONDS AND CERTIFICATES.

**SECTION 841. Certificates issued.**

[See section 792-a, *supra* (section 1, chapter 29, acts of the 28th G. A.) which by the title of said act is made amendatory of this chapter.—Ed.]

[For earlier annotations, see code, pages 350-1.—Ed.]

Where a contractor agrees to take certificates in full payment for the work done, and the city, having authority to assess the entire cost on abutting property and issue certificates therefor to the contractor, attempts to issue illegal certificates for a portion of the amount against a street railway company not liable for the payment of any portion of the assessment, the city

is bound to pay to the contractor the amount of the illegal certificates. *Ft. Dodge Elec. L. & P. Co. v. Ft. Dodge*, 89 N. W., 7.

The contractor by accepting the illegal certificates does not preclude himself from remedy against the city, inasmuch as he is not bound to know that the necessary steps to render the certificates valid and binding have been taken. *Ibid.*

**SEC. 842. Bonds.**

[For earlier annotations, see code, page 351.—Ed.]

Where the city by contract has rendered itself liable for the cost of street improvements, bonds to cover such cost will be in-

valid if in excess of the constitutional limit. *Allen v. Davenport*, 107-90.

**SEC. 847. Bonds paid.**

In equity the bond holder has the right to call upon the city to employ for his protection every power and right a city can exercise to levy and collect from the property benefited by the improvement the cost thereof which is in fact and in truth represented by the bonds issued. *Burlington Sav. Bank v. Clinton*, 111 Fed., 439.

## CHAPTER 9.

## OF PARK COMMISSIONERS AND BOARD OF PUBLIC WORKS.

**SECTION 850. Election of park commissioners in certain cities.**

There shall be elected at the regular city election in each city containing a population of forty thousand or over, and cities having a population of twelve thousand five hundred and under forty thousand may by ordinance provide for the election of three park commissioners, whose terms of office shall be six years, one to be elected each even-numbered year, but at the first election three shall be elected, and hold their offices, respectively, for two, four and six years, who shall by lot determine their respective terms. [24 G. A., ch. 1, § 1; 24 G. A., ch. 2, § 1; 20 G. A., ch. 151, § 1.] [27 G. A., ch. 25, § 1.] [28 G. A., ch. 30, § 1.] [29 G. A., ch. 45, §§ 1, 2.]

[For annotations, see code, page 353.—Ed.]

**SEC. 851. Qualification—organization—treasurer—compensation.**

The commissioners shall, within ten days after their election, qualify by taking the oath of office, and organize as a board by the election of one of their number as chairman and one as secretary, but no bond shall be required of them. They shall also elect a treasurer, not one of their number, who shall give bonds in the sum of twenty-five thousand dollars, the penalty of which may be increased by the board. The treasurer shall receive and pay out all moneys under the control of said board as ordered by it, but shall receive no compensation for his services. Each of the commissioners shall receive, for services actually performed, compensation at the rate of five dollars per day, not to exceed one hundred days in any year, and be reimbursed for all actual expenses incurred or money paid out by him in connection with the discharge of his official duties; but, in cities having a population not exceeding twenty-five thousand, the compensation of each commissioner shall not exceed one hundred dollars per annum. An itemized statement of all expenses and moneys paid out shall be made under oath and filed with the secretary, and allowed only by the affirmative vote of the full board. [25 G. A., ch. 1, § 1; 24 G. A., ch. 1, § 2.] [28 G. A., ch. 30, § 2.]

**SEC. 852. Tax certified—rate in certain cities—purposes—additional tax.** The board shall, on or before the first Monday in September of each year, certify to the county auditor the per cent. of taxes it may fix for park purposes, not exceeding three mills on the dollar in cities having a population of over twenty-two thousand, and not exceeding one mill in cities having a population under twenty-two thousand, on all taxable property of the city, to be known as "park fund" and, when collected, to be paid over to the treasurer of the board, and by him paid out on its orders, which shall state the name of the payee and the amount, and the purposes for which such amount has been expended. No money of this fund shall be appropriated or expended for any purpose except as provided in this chapter. Such fund may be used in purchasing or acquiring real estate for park purposes, including streets or highways to connect one park with another, or to connect a park with streets or highways, or for other purposes necessary and incident to the establishment and maintenance of parks, and for the purpose of improving and maintaining the same and defraying necessary expenses connected therewith, including the compensation of the board, its officers

and employes; but when any annual tax or part thereof has been pledged for the payment of any bonds or the interest thereon, such tax or part thereof shall be devoted to no other purpose. In cities having a population of over twenty-five thousand said board is further authorized in its discretion to certify to the county auditor in the years 1900, 1901, 1902, and 1903, and cause to be collected, an additional tax for park purposes of one mill on the dollar on all taxable property of the city, in the manner provided by this section as hereby amended; but the power to levy such additional tax shall cease at the end of the four years above specified. [25 G. A., ch. 1, § 2; 25 G. A., ch. 2, § 1; 24 G. A., ch. 1, §§ 3, 4; 20 G. A., ch. 151, §§ 3-5.] [28 G. A., ch. 30, § 3.] [28 G. A., ch. 31, § 1.] [29 G. A., ch. 163, § 1.]

**SEC. 859. Park commissioners in other cities and towns—term of office.** All cities having a population under twelve thousand five hundred and towns may provide by ordinance for the election of three park commissioners whose terms of office shall be two, four and six years, respectively, and their successors shall be elected for the full term of six years. Such commissioners shall be residents of the city or town, and each shall, before he enters upon the duties of his office, give a bond, with sureties to be approved by the council, to the use of the city in the penal sum of five thousand dollars conditioned for the faithful discharge of the duties of his office. The terms of such commissioners as shall expire in a year in which no biennial election is held are hereby extended until the next succeeding biennial election. [27 G. A., ch. 25, § 2.] [27 G. A., ch. 26, §§ 1, 2.] [28 G. A., ch. 30, § 4.] [29 G. A., ch. 45, § 3.]

**SEC. 860. Voting tax for park fund—improvement of parks—rivers—dams, etc.** The council of such city or town may, by resolution, submit to the qualified electors of the same, at a regular or special election, the question whether there shall be levied upon the assessed property thereof a tax not exceeding two mills on the dollar for the purpose of purchasing real estate for parks, and the improvement of parks and rivers and constructing dams for the purpose of beautifying and improving parks and rivers, or for either or all of such purposes. The proposition therefor shall be submitted in the manner provided for similar propositions in the chapter on elections. The council shall, in the resolution ordering such election, specify the rate of taxation proposed and the number of years the same shall be levied. If a majority of the votes cast at such election on the proposition so submitted shall be in favor of the adoption of the proposition for taxation, the council shall levy the tax so authorized, which shall be collected and paid over to the treasurer of such city or town in the same manner as other taxes. Such taxes shall be known as "park fund," and shall be paid out on the order of the commissioners for the purposes contemplated in the next section, and for no other purpose whatever. [26 G. A., ch. 24.] [29 G. A., ch. 46, § 1.]

**SEC. 861. Powers and compensation of commissioners—condemnation of land for.** Each of the commissioners shall receive for services performed compensation not exceeding one hundred dollars per annum to be paid out of the "park fund." They shall have exclusive control of the parks of the city or town, and shall manage, improve and supervise the same; they may use the "park fund" for improving the parks and rivers, constructing dams for the purpose of beautifying and improving parks and rivers, or for purchasing additional grounds within or without the corporate limits, or laying out and improving avenues thereto; they may appoint one or more park policemen and pay them out of said fund, and may do all things necessary to preserve such parks. They shall keep, and make annually to the council, a full account of their disbursements, and all orders drawn on such fund shall be signed by at least two of their number. If the park commissioners and the owners of any property desired by them for park purposes or for constructing dams for the purpose herein provided situated within or without the corporate limits cannot agree as to the price to be paid therefor said

park commissioners may cause the same to be condemned in the manner provided for taking land for city purposes. [29 G. A., ch. 46, § 2.]

**SEC. 862. Jurisdiction over—protection of parks—penalty.** The jurisdiction of such cities and towns shall extend over all lands used for parks without the corporate limits and all ordinances of such cities and towns shall be in full force and effect in and over the territory occupied by such parks. Any person who shall, except by the authority of such commissioners, cut, break or deface any tree or shrub growing in such park or parks, or any avenue thereto, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment in the county jail not exceeding thirty days or by fine not exceeding one hundred dollars. [29 G. A., ch. 46, § 3.]

**SEC. 862-a. City council may appropriate.** In towns and cities of five thousand population, or less, the council may appropriate each year not exceeding five per cent. of the general fund for the improvement and maintenance of public parks. [29 G. A., ch. 47, § 1.]

**SEC. 862-b. How expended.** Said fund so appropriated shall be expended under the direction of a committee of three persons, consisting of the mayor, one member of the council appointed by the council, and one resident property owner of such city or town appointed by the council, which committee shall receive no compensation for their services. [29 G. A., ch. 47, § 2.]

**SEC. 870. Public works.**

Bridges will not be regarded for all purposes as parts of the street under this section. So held with reference to provisions for paving. *Cedar Rapids v. Cedar Rapids & M. R. Co.*, 108-406.

CHAPTER 9-A.

OF IMPROVEMENT OF THE CHANNELS OF MEANDERED STREAMS WITHIN THE CORPORATE LIMITS OF CERTAIN CITIES

AN ACT TO AUTHORIZE THE IMPROVEMENT OF THE CHANNELS OF MEANDERED STREAMS DIVIDING THE TERRITORY WITHIN THE CORPORATE LIMITS OF CERTAIN CITIES AND TO AUTHORIZE THE RECLAIMING OF LANDS BETWEEN THE MEANDERED LINES OF SAID STREAMS WITHIN SAID CORPORATE LIMITS AND TO CREATE A COMMISSION THEREFOR AND DEFINING ITS POWERS AND PRESCRIBING ITS DUTIES.

WHEREAS the title to the beds of the meandered streams in Iowa, including all the land between the meandered lines of such streams is vested in the state of Iowa and under control of the legislature, and

WHEREAS much of said lands between the meandered lines of such streams is land, not needed by the waters of such streams for channels or water courses, and

WHEREAS such lands as lie within the corporate limits of said cities would be of great value to the public if reclaimed by walls or embankments to secure an adequate channel for such streams, and

WHEREAS the courses of such streams through such cities could be beautified and made regular and sanitary and the expense of bridging greatly reduced, where they are now unsightly, irregular, unsanitary and of such great width that the expense of bridging and maintaining bridges is very great, and

WHEREAS the state can make no use of said lands and has an interest in the improvement of the channels of streams, therefore

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

**SECTION 879-a. Petition—river front improvement commission.** That whenever five hundred electors of any city whose corporate limits are divided by a meandered stream, shall, in writing, petition the governor of this state for the appointment of a commission, as provided for by this act, he shall within one month thereafter, appoint three electors, residents of the city of the said electors so petitioning, who shall constitute a body corporate, to be known as the river front improvement commission of \_\_\_\_\_, inserting in said blank the name of the city of the said electors so applying. [29 G. A., ch. 210, § 1.]

**SEC. 879-b. Election.** That one commissioner shall be elected at each biennial city election after the passage of this act to succeed one of the commissioners so appointed, whose term shall expire when his successor is elected and qualified. [29 G. A., ch. 210, § 2.]

**SEC. 879-c. Organization—secretary—treasurer.** The commissioners shall, within ten (10) days after their appointment, qualify by taking the oath of office, determine, by lot, the order of the expiration of their terms, and organize by the election of one of their number as chairman; they shall also elect a secretary, not one of their number; and shall also elect a treasurer, not one of their number, who shall give bonds in the sum of twenty-five thousand dollars (\$25,000) the penalty of which may be increased by the commission. The treasurer shall receive and pay out all moneys under the control of said commission as ordered by it, but shall receive no compensation for his services. Each of the commissioners shall be reimbursed for the actual expenses incurred or money paid out by him in connection with the discharge of his official duties, but shall receive no compensation for his services. An itemized statement of all expenses and moneys received and paid out shall be made under oath and filed with the secretary and allowed by the commission. [29 G. A., ch. 210, § 3.]

**SEC. 879-d. Title to river bed.** That when said commissioners have been so appointed and qualified, the fee simple title to the bed of the meandered stream, separating the corporate limits of the city, for which they are appointed, shall immediately vest in the commission in trust for the public and the same while held by the commission shall be exempt from taxation, provided that the fee title to the channel or bed of the stream to be located and preserved as hereinafter provided shall remain in the state, and provided also, that the vested rights of riparian owners and owners of water powers, shall not be injuriously affected by this act. [29 G. A., ch. 210, § 4.]

**SEC. 879-e. Powers.** Said commission may redeem lands between the meandered lines of such stream, construct, regulate and maintain dams across such streams, provide for and protect, by secure walls or banks, a channel adequate to carry flood waters of a volume equal to all reasonable expectations, based on past experience, and the area drained by such stream, according to expert authority; beautify such walls or banks; and park so much thereof as public interest may require; and where circumstances permit, make any part of the area redeemed and acquired suitable for sites for public buildings. [29 G. A., ch. 210, § 5.]

**SEC. 879-f. Profiles and specifications—approval.** That said commission may adopt plans, profiles and specifications for the improvement of the said river channel and banks, and the reclaiming of lands between the meandered lines of said stream within such city, and the construction of dams; but before the beginning of the execution of the same, such plans, profiles and specifications shall be approved by the executive council of Iowa. [29 G. A., ch. 210, § 6.]

**SEC. 879-g. Additional powers—annual report.** Said commission may acquire real estate and riparian and other rights within such city in the vicinity of such stream by donation, or purchase, or by condemnation for the

public uses herein authorized in the manner provided by law for the taking of private property for public use, and shall take the title to property in the name of the commission and its successors, in trust for the public, and hold the same exempt from taxation. It may sell and convey or lease, or exchange any property acquired by it, by virtue of this act and otherwise. It shall have exclusive control of all the lands acquired by it, and of the banks and waters of such stream for carrying out the purposes of this act, may make contracts and sue and be sued. It shall keep a record of all its transactions, which shall during ordinary business hours be open to inspection by the public and shall make an annual report of all moneys received and expended by it and for what general purposes, and of all moneys owing to it and by it and for what general purposes, to the city council at the regular November meeting, and publish such report in some newspaper in the city. [29 G. A., ch. 210, § 7.]

**SEC. 879-h. Bonds—mortgages.** For the purpose of paying for real estate and improvements and accomplishing the purposes of its creation, said commission may issue bonds in such amounts as it may deem necessary, and may execute trust deeds or mortgages upon its property acquired by virtue of this act and otherwise or any part thereof to secure the payment of said bonds and interest thereon. [29 G. A., ch. 210, § 8.]

**SEC. 879-i. Cities may aid in making improvements.** That such city shall not be liable for any indebtedness incurred by said commission or for any bond issued by said commission. That such cities are hereby authorized to aid in making the improvements specified in this act by appropriating money from its general fund or from the surplus remaining at the end of the fiscal year in any special fund, except in cases where such diversion of moneys is especially prohibited by statute, and may appropriate in aid of the improvements herein provided for, the reasonable saving effected in the building of bridges and otherwise by reason of said improvements. [29 G. A., ch. 210, § 9.]

**SEC. 879-j. Rules and regulations—penalty.** Said commission may, in writing, prescribe rules and regulations for the government of the public grounds under their control and persons resorting thereto, which rules and regulations shall be enforced when entered in the record of the proceeding of the commission, and a copy thereof signed by the commissioners has been posted at each gate or principal entrance to any such public grounds and a wilful violation thereof shall be a misdemeanor, punishable by fine not exceeding twenty-five dollars (\$25). Anyone who shall cut, break or deface any tree or shrub growing in such public grounds, without authority, shall be guilty of a misdemeanor and be punished by fine not exceeding one hundred dollars (\$100) or by imprisonment not exceeding thirty (30) days in jail. Any magistrate in the city shall have jurisdiction to try such offenses. [29 G. A., ch. 210, § 10.]

**SEC. 879-k. Police protection—water supply—poles and wires.** The mayor, on written request of the commission, shall furnish adequate police protection for such public grounds and the city shall furnish such water supply as may be necessary therefor, and properly light the same at its expense. The commission shall be entitled to the services of the city engineer, when requested, without expense to it. It shall have the power to permit or forbid the erection of poles or the stretching of wires for electric light, street railway or other purposes by persons or corporations, in such public grounds or in or along streets, highways or over public places laid out or controlled by it. [29 G. A., ch. 210, § 11.]

**SEC. 879-l. Wharves—landing places—bath and boat houses.** That said commission shall have power, in and over the bed and banks of such river as specified, to construct and regulate the use of wharves, landing places, bath houses, boat houses and other suitable structures and shall have exclusive jurisdiction over the water of such stream, within the corporate

limits of such city and may maintain said stream in a suitable condition for boating, skating and other public amusements and purposes. [29 G. A., ch. 210, § 12.]

**SEC. 879-m. What prohibited.** No member of the commission shall, during the time for which he has been appointed or elected, or for one year thereafter, be appointed to any office in the gift of the commission which shall be created, or the emolument of which shall be increased, during the term for which he was elected, nor shall he be interested directly or indirectly in any contract for work or service to be performed for the commission or in the purchase or sale of any property sold to or by the commission. [29 G. A., ch. 210, § 13.]

**SEC. 879-n. Vacancies.** In case vacancy arises in the commission, the governor of the state shall fill such vacancy by appointment for the unexpired portion of the term or until the next election as the case may be. [29 G. A., ch. 210, § 14.]

**SEC. 879-o. Cities affected.** The provisions of this act shall apply only to cities acting under special charter and cities of the first class acting under the general incorporation laws having a population of less than twenty-five thousand (25,000). [29 G. A., ch. 210, § 15.]

**SEC. 879-p. In effect.** This act being deemed of immediate importance shall take effect and be in force from and after its publication in the Iowa State Register and the Des Moines Leader, newspapers published at Des Moines, Iowa, without expense to the state. [29 G. A., ch. 210, § 16.]

Approved March 14th, 1902.

I hereby certify that the foregoing act was published in the Iowa State Register and the Des Moines Leader, March 15th, 1902.

W. B. MARTIN,  
Secretary of State.

## CHAPTER 10.

### OF CONDEMNATION AND PURCHASE OF LAND.

#### SECTION 880. For what purpose.

[For earlier annotations, see code, page 359.—Ed.]

The power to condemn may be delegated to municipalities and when this is done they have the same power as the state acting through any regularly constituted authority. *Bennett v. Marion*, 106-628.

The city may be allowed to determine for itself whether a particular improvement shall be made but the land owner may raise a question as to the amount of land necessary for the purpose contemplated. *Ibid.*

If the land sought to be taken will to some extent conduce to the public use to which it is to be devoted, a decision of the municipality that it is necessary therefor should not be interfered with; otherwise it should be set aside. *Ibid.*

The jury should be directed to include, as

#### SEC. 881. Sewer outlets.

The question whether the amount of land sought to be condemned is necessary for a sewer outlet may be raised by the land owner. *Bennett v. Marion*, 106-628.

In estimating damages, an improper use for sewer purposes such as would give rise

damages, incidental injuries to the balance of the land owner's property by reason of the proper use of the condemned portion for the purpose contemplated. *Ibid.*

This section does not give the city any right to establish a pest house on property acquired by the city outside of its limits. *Giles v. Shenandoah*, 111-86.

A city has authority to acquire land by condemnation for a public landing, and when so condemned it may give the right of way thereover to a railway company. *Diamond Jo Line Steamers v. Davenport*, 114-432.

The fact that the property is already owned by a private corporation as a steamboat landing does not prevent its condemnation for a public landing. *Ibid.*

to a nuisance is not to be considered, but the jury should be allowed to consider in what way the taking of land for these purposes would inconvenience the land owner in the use of the remainder of his land or lessen its value and if sewers properly con-

structed would have this effect, then the jury should be directed to take this into consideration in making up their verdict. *Ibid.*

In such cases the city may be allowed to

determine for itself whether the particular improvement shall be made, but the necessity for taking for that purpose the amount of land sought to be taken may be questioned by the land owner. *Ibid.*

### SEC. 883. Disposal of lands acquired.

The city may grant the land covered by a street which is duly vacated to a rail-

road company for depot purposes. *Spitzer v. Runyan*, 113-619.

### SEC. 884. Proceedings for condemnation.

Costs made by the commissioners are to be paid by the corporation in any event. Only those involved in the appeal to the district court and attorneys' fees occasioned thereby depend in any way on the result of the trial. These are to be taxed against the corporation, except in the contingency of a trial at which the amount of damages is not increased. If that contingency does not arise the costs are to be paid by the corporation. *Mellichar v. Iowa City*, 90 N. W., 86.

it is but just and equitable that the party attempting to wrest the property from its owner should pay the expenses of litigation already incurred. *Ibid.*

The charge of the attorney in preparing an answer may properly be included in estimating the attorneys' fees, even though a formal answer is not required by the statute. *Ibid.*

On the abandonment of the proceedings

Compensation for services rendered in other appeals, or in suits for the protection of the plaintiff's property, cannot be allowed. *Ibid.*

### SEC. 886. Submission of question.

The provisions of this and the preceding section have no application to a case where the city vacates a street for use of a rail-

road company as depot grounds. *Spitzer v. Runyan*, 113-619.

## CHAPTER 11.

### OF TAXATION.

**SECTION 891. Labor on highways.** Any city or town shall have power to provide that all able-bodied male residents of the corporation between the ages of twenty-one and forty-five years, between the first day of January and the first day of November of each year, either by themselves or satisfactory substitute, shall perform two days' labor of eight hours each upon the streets, avenues, alleys, highways or public grounds within such corporation, at such times and places as the proper officer may direct, upon three days' notice in writing given, or pay in lieu thereof in money a sum to be fixed by such council, not exceeding one and a half dollars for each of such day's labor. For each day's failure to attend and perform the labor, or pay said sum of money, as required, at the time and place specified, unless excused by the supervisor of highways or street commissioner, the delinquent shall forfeit and pay the sum of two dollars, not exceeding four dollars in all. Any person excused shall be again notified to perform such labor or pay said sum of money in lieu thereof, at any time prior to November first of said year. All persons claiming to be exempt from labor under this section shall, within three days after receiving notice to perform such labor, furnish the mayor or other proper officer with an affidavit showing the extent and nature of the disabilities entitling him to such exemption. If he fails to do so he shall be liable to perform such labor or pay the penalty provided herein. [19 G. A., ch. 32; C. '73, § 487.] [27 G. A., ch. 27, § 1.]

**SEC. 892. Enforcement of road tax.** In case of failure to pay said sum of money in lieu of said labor, together with such forfeit, to the supervisor of highways, street commissioner, or other officer of said corporation authorized to receive the same within ten days from the expiration of the

time fixed for the performance of such labor, said corporation may recover the same by action brought in the name of such city or town before the mayor of said corporation, or before any justice of the peace in the proper township. No property or wages belonging to said person shall be exempt to the defendant on an execution issued for said judgment and costs. The tax and forfeit money so collected shall be expended upon the streets, avenues, highways, alleys or public grounds of said corporation. All of such tax and forfeit money remaining unpaid on the first day of November in each year may be certified to the county auditor at any time before the following first day of December, and shall be entered by him upon the tax list of said county, and treated and collected as ordinary county taxes, and shall be a lien on all the real property of the delinquent. [19 G. A., ch. 32; C. '73, § 487.] [27 G. A., ch. 27, § 2.]

**SEC. 894. Other taxes.** Any city shall have power to levy annually the following special taxes:

1. *Grading fund.* A tax not exceeding, in any one year, three mills on the dollar, for a grading fund, to be used for the purpose of opening, widening, extending and grading any street, highway, avenue, alley, public ground or market place; [23 G. A., ch. 5, § 1; 21 G. A., ch. 160, §§ 2, 3; 20 G. A., ch. 20, § 5.]

2. *Improvement fund.* A tax not exceeding, in any one year, five mills on the dollar, for a city improvement fund, to be used for the purpose of paying the cost of the making, reconstruction or repair of any street improvements at the intersections of streets, highways, avenues or alleys, and at spaces opposite streets, highways, avenues and alleys intersecting but not crossing, and at spaces opposite property owned by the city or the United States, and for the purpose of paying the purchase price and subsequent taxes assessed against property purchased by the city at tax sale; [25 G. A., ch. 8, § 1; 22 G. A., ch. 12, § 1; 21 G. A., ch. 160, §§ 2, 3; 19 G. A., ch. 38, §§ 1, 2.]

3. *Sewer fund.* A tax not exceeding, in any one year, two mills on the dollar on the assessed valuation of all property therein, for a city sewer fund, when the entire city comprises one sewer district, to be used to pay the cost of the making, reconstruction or repair of any sewer at the intersection of streets, highways, avenues, alleys, and at spaces opposite streets, highways, avenues and alleys intersecting but not crossing, and at spaces opposite property owned by the city or the United States, and to pay the whole or any part of the cost of the making, reconstruction or repair of any sewer within the limits of said city; when a city has been divided into sewer districts, a tax not exceeding two mills on the dollar on the assessed valuation of all property in the sewer district, for a district sewer fund, to be used to pay, in whole or in part, the cost of the making, reconstruction or repair of any sewer located and laid in that particular district; [25 G. A., ch. 7, § 11; 22 G. A., ch. 7, § 1; 21 G. A., ch. 34; 17 G. A., ch. 162, § 1; 16 G. A., ch. 107, § 1.]

[For annotations, see code, page 362.—Ed.]

4. *Library tax.* In cities having a population of twenty-five thousand or over and towns which have, or may hereafter establish, a free public library, when the trustees of such library have made the certificate provided for in chapter four, of this title, a tax in the amount so certified, but not exceeding in any one year one mill on the dollar in such cities of the first class, and not exceeding two mills on the dollar in cities of the second class and towns, to be used for the maintenance of such library; and in such cities of the first class, an additional tax not exceeding in any one year three mills on the dollar, for the purchase of real estate and the erection of a building or buildings thereon for a public library, or for the payment of interest on any indebtedness incurred for that purpose, and for the creation of a sinking fund for the extinguishment of such indebtedness. In all other cities of the first class which have or may hereafter establish a free public

library, a tax not exceeding in any one year one mill on the dollar for the maintenance thereof; [26 G. A., ch. 5; 25 G. A., ch. 43, § 1; 25 G. A., ch. 99, § 2; 22 G. A., ch. 18, § 1; C. '73, § 461.]

5. *Water works tax.* A tax not exceeding, in any one year, five mills on the dollar, which, with the water rates or rents authorized, shall be sufficient to pay the expenses of running, operating and repairing water works owned and operated by any city or town, and the interest on any bonds issued to pay all or any part of the cost of construction, renewal, repair or extension of such works; but such tax shall not be levied upon property which lies wholly without the limits of the benefit and protection of such works, which limits shall be fixed by the council each year before making the levy; [C. '73, § 475.] [29 G. A., ch. 48, § 1.]

6. *Tax for gas works or electric plant.* A tax not exceeding, in any one year, five mills on the dollar, which, with the rates or rentals authorized, shall be sufficient to pay the expenses of running, operating and repairing gas works and electric light or power plants owned by any city or town, and the interest on any bonds issued to pay all or any part of the cost of the construction of such works or plants; but such tax shall not be levied upon property which lies wholly without the limits of the benefit of the same, which limits shall be fixed by the council each year before making the levy; [22 G. A., ch. 11, § 2; C. '73, § 475.]

7. *Water tax.* A tax not exceeding, in any one year, five mills on the dollar, for the purpose of paying the amount due or to become due to any individual or company operating water works for water supplied under any contract, the levy to be limited to the property as in subdivision five hereof; and if in cities of the first class the maximum tax is insufficient to pay such amount under contracts now in force, the deficiency shall be paid out of the general fund; [C. '73, § 475.]

[For annotations, see code, page 363.—Ed.]

8. *Tax for gas or electric light or power.* A tax not exceeding, in any one year, five mills on the dollar, for the purpose of paying the amount due or to become due to any individual or company operating gas works or electric light or power plants for all gas, electric light or power supplied under any contract, the levy to be limited to the property as in subdivision six hereof; [22 G. A., ch. 11, § 2; C. '73, § 475.]

9. *Bond fund tax.* A tax for the purpose of creating a bond fund sufficient to pay the interest to accrue before the next annual levy on funding or refunding bonds outstanding, and such proportion of the principal that at the end of five years the sum raised shall equal at least twenty per cent. of the amount of the bonds issued, at the end of ten years at least forty per cent. of said amount, at the end of fifteen years at least sixty-five per cent. of said amount, and at or before the date of the maturity of said bonds a sum equal to the whole amount of the unpaid principal and interest, which tax shall be used to pay such principal and interest, and for no other purpose; [24 G. A., ch. 14, § 5; 23 G. A., ch. 4, §§ 6, 7; 22 G. A., ch. 17, § 5; 21 G. A., ch. 78, § 5.]

10. *Tax for water or gas works or electric plant bonds.* A tax as authorized in the preceding subdivision, to be levied in the proportions therein set forth, and to be used exclusively in payment of the principal of bonds issued for the construction of water and gas works and electric light and power plants, which tax shall not be levied upon property lying wholly without the limits of the benefit of such works or plants, which limits shall be fixed by the council each year before making the levy; [23 G. A., ch. 13, § 1; 22 G. A., ch. 10, § 1.]

11. *Cemetery tax.* A tax, not exceeding one-half of one mill on the dollar of the assessed valuation of the property within the corporate limits, for

the care, preservation and adornment of any cemetery owned or controlled by the city.

12. *Subdivisions five, six, seven, eight, nine and ten, extended to incorporated towns, and proceedings legalized.* The provisions of subdivisions five (5), six (6), seven (7), eight (8), nine (9), and ten (10) of said section eight hundred and ninety-four (894) are extended to incorporated towns, and all proceedings of incorporated towns had under the assumption that the said provisions were applicable to said incorporated towns are hereby legalized and confirmed, and said proceedings shall be in law held to be valid to the same extent as if the said subdivisions of said section eight hundred and ninety-four (894) of the code included incorporated towns by the specific terms thereof. [28 G. A., ch. 32, § 1.]

#### SEC. 898. Loans in anticipation of revenue.

[For earlier annotations, see code, page 364.—Ed.]

The object of this provision is to place municipal corporations on a cash basis and prevent the accumulation of a floating indebtedness. *Phillips v. Reed*, 107-331, and see *Phillips v. Reed*, 109-188. A city is not authorized, when borrowing money in anticipation of its revenues, to issue negotiable bonds therefor. *German Ins. Co. v. Manning*, 95 Fed., 597.

#### SEC. 902. Assessments and taxes certified.

[For earlier annotations, see code, pages 365-6.—Ed.]

Where the proper notice of expiration of the period of redemption has not been served, so that the deed can properly be issued, the limitation of this section is not applicable. *Hintrager v. McElhinny*, 112-325.

### CHAPTER 13.

#### OF PLATS.

#### SECTION 915. Acknowledgment and recording—abstract of title.

Every such plat shall have a complete abstract of title attached thereto, and shall be accompanied by a statement to the effect that the subdivision of (here insert a correct description of the land or parcel subdivided), as appears on this plat, is with the free consent and in accordance with the desire of the proprietor, which shall be signed and acknowledged by him before some officer authorized to take the acknowledgment of deeds. Such proprietor shall also procure from the treasurer of the county in which the land lies, and file with the recorder, a certified statement that the land laid out into lots, streets and alleys is free from taxes, and a certified statement of the clerk of the district court that said land is free from all judgment, attachment, mechanics, or other liens, as appears by the records of his office, and a certified statement from the recorder that the title in fee is in such proprietor, and that it is free from incumbrance; but if the parcel of land so laid out shall be incumbered with a debt certain in amount, and which the creditor will not accept with accrued interest to the day of proffered payment if it draws interest, or with a rebate of interest at the rate of six per cent. per annum if it draws no interest, or if the creditor cannot be found, then such proprietor, and, if a corporation, its proper officer or agent, may file with the recorder of such county an affidavit, stating either that such proprietor has offered to pay such creditor the full amount of his debt, with interest, or with a rebate of interest, as the case may be, and that he would not accept the same, or that he cannot be found, whereupon such proprietor may execute and file with the recorder a bond in double the amount of such incumbrance, with three sureties who shall be freeholders of the county, to be approved by the recorder and clerk of the district court, which bond shall run to the county,

and shall be for the benefit of the purchasers of any lots, and shall be conditioned for the payment of such incumbrance and the cancellation thereof of record as soon as practicable after the same becomes due, and for the holding of all purchasers and those claiming under them forever harmless from such incumbrance. When such affidavit and bond shall have been filed with the recorder, together with the certificate of approval of the council of the city or town in which such land is situated or which is proposed to be made an addition thereto and a certificate of the recorder that said land is free from all incumbrance except as secured by said bond, and that the title in fee is in such proprietor, and that of the treasurer that the land is free from taxes, said plat shall be admitted to record, and be as valid as if such proprietor had filed with the recorder the certificate of such officer that said land was free from all incumbrance. [18 G. A., ch. 53, § 1; C. '73, § 560.] [29 G. A., ch. 49, § 1.]

[For annotations, see code, page 370.—Ed.]

### SEC 917. Dedication to public.

[For earlier annotations, see code, pages 370-4.—Ed.]

The title to streets and alleys as laid out in the plat does not pass to the city until the dedication is accepted. *Brown v. Taber*, 103-1.

Where none of the lots abutting on such streets or alleys have been conveyed the owner may vacate the plat and will thereafter be the unquestionable owner of the vacated streets and alleys. Subsequent grantees of lots described in such plat will not be entitled to proportional shares of the streets and alleys so vacated. *Ibid.*

A deed which is inconsistent with the dedication of the streets and alleys of a plat to the public may amount to a revocation of the attempted dedication, unless it be shown that the public accepted the dedication before the deed was made. *Minneapolis & St. L. R. Co. v. Britt*, 105-198.

While a substantial compliance with statutory provisions is all that is required to effect a dedication of portions of a plat laid out for streets and alleys, yet where the plat did not show the width of such streets and the size of the lots and blocks except as determinable by scale from the plat itself, held that it was too indefinite to be effectual. *Ibid.*

The plat of the city of Keokuk did not operate to vest the fee of the land in the streets in the city. *Chicago, B. & Q. R. Co. v. Kelley*, 105-106.

Although in a city under special charter the title in the streets may be in the abutting property owner so that the city has no right to use such streets for any purpose whatever other than that for which they were originally designed, yet the erection of trolley poles in the street in front of the property of an abutting owner is not such an additional use of the street as may be enjoined by a property owner in the absence of additional compensation. *Snyder v. Fort Madison St. R. Co.*, 105-284.

With reference to portions of the premises covered by a plat which are set apart for streets, the city may so deal with an-

other claiming title thereto, by subjecting it to the payment of public charges, as to estop itself from asserting title as against him. *Davenport v. Boyd*, 109-248.

The owner of property, chargeable with such knowledge of the use and improvement of an abutting street as a reasonably prudent and observing person having care for his property would ordinarily acquire, is chargeable with notice of the dedication of an abutting street by the owner, and acceptance thereof by the public. *Hanger v. Des Moines*, 109-480.

The levy and collection by the city of taxes on a strip of land which has been dedicated and accepted as a street will not estop the city, as the representative of the public, from asserting its rights in such street. *Ibid.*

Payment of taxes on property is admissible as evidence against a claim of a dedication thereof to the public. *Brown v. Cedar Rapids*, 90 N. W., 711.

To warrant the presumption of dedication, the use must be of a kind to convey to the owner knowledge of its extent and adverse nature. *Ibid.*

In a contest between grantor and grantee, where the plat differs from the survey, the latter will control. It may be that as to a purchaser buying in reliance on the plat as showing the dimensions of the lot, or as to a public officer charged with opening the streets, as shown by the plat, the rule would be otherwise. *Thrush v. Graybill*, 110-585.

Where the question was as to dedication in a plat made by county commissioners, held that the vital inquiry was as to the intent with which the commissioners acted in determining whether a square, which had been used for a court house, had been dedicated to the city, or retained by the county, and that, in order to determine this, the acknowledgment should be considered in connection with the plat, the certificate of survey, and such circumstances as might

throw light on the transaction. *Youngerman v. Board of Supervisors*, 110-731.

And under the language of the instruments, and the circumstances surrounding their execution, held in a particular case that the title to such square did not pass to the city, but had been excepted from the dedication and retained by the county. *Ibid.*

The court is not authorized to add a line to the plat for the purpose of limiting the extent of the land dedicated to public use which does not appear on the plat as originally made, unless, perhaps, when there is a conflict in the boundaries, or in some cases when the plat is shown to be not in accordance with the original survey. *Boehler v. Des Moines*, 111-417.

Facts in a particular case held sufficient to show dedication of a street to the city.

#### SEC. 919. Part of plat vacated.

[For earlier annotations, see code, page 374.—Ed.]

While provisions are here made for vacation of part of a plat, yet if the rights and privileges of other proprietors in the plat are affected and they do not consent

and its acceptance. *Hull v. Cedar Rapids*, 111-466.

The fact that the city exacts taxes on the dedicated property does not estop it from claiming that the same has become a public street. *Ibid.*

A reasonable time is allowed for acceptance by the public of a highway dedicated by a plat, and what is such reasonable time necessarily depends upon the situation and circumstances. *Sarvis v. Caster*, 89 N. W., 84.

Evidence in a particular case held sufficient to show that an alley had been dedicated to public use. *Dodge v. Hart*, 113-685.

An alley marked on the plat may become public by a common law dedication and acceptance. *Keokuk v. Cosgrove*, 89 N. W., 983.

#### SEC. 920. Vacation by lot owner.

A highway ought not to be vacated under the provisions of this section unless the immediate abutting owners so request. *Sarvis v. Caster*, 89 N. W., 84.

to the vacation, it is not effectual. So held as to streets in a plat which the owner attempted to vacate. *Uptagraff v. Smith*, 106-385.

A highway will not be vacated if it appears that in all reasonable probability it will soon be needed for public use, although it has not already been used by the public. *Ibid.*

#### SEC. 923. Platting for assessment and taxation.

The plat referred to in this section is not a municipal plat. It does not fix the character of the land but only its description, and extension of the corporate limits of the city so as to include such plat, held not to

make it a city or town plat, within the provisions of § 1996, Code of '73, as to the extent of the homestead within town plats. *Parrott v. Thiel*, 90 N. W., 745.

### CHAPTER 14.

#### OF CITIES UNDER SPECIAL CHARTERS.

#### SECTION 933. General provisions not applicable.

[For earlier annotations, see code, page 378.—Ed.]

The sections in this chapter are applicable only to cities under special charter. *Harvey v. Clarinda*, 111-528.

#### SEC. 947. Ordinances—fines.

A city may not impose a fine in excess of \$100 for breach of an ordinance, and if the ordinance provides cumulative penalties for a continuing offense, so that the

aggregate fines for such offense may amount to more than \$100, the ordinance is in that respect void. *State v. Babcock*, 112-250.

#### SEC. 952. Ordinances signed and published—general powers.

Sections six hundred and eighty-five, six hundred and eighty-six, six hundred and eighty-seven and six hundred and ninety-three of chapter three of this title, and sections six hundred and ninety-five to seven hundred and nineteen, seven hundred and twenty-two to seven hundred and thirty-two inclusive, of chapter four of this title, are hereby made applicable to cities acting under special charter. [27 G. A., ch. 28, § 1.]

**SEC. 953-a. Repeal.** That section nine hundred and fifty-three (953) of the code and section two (2) of chapter twenty-eight (28) of the acts of the Twenty-seventh General Assembly be and the same is hereby repealed. [29 G. A., ch. 50, § 1.]

**SEC. 955. Water and gas works.**

The notice contemplated by this section desired, but also of the very terms of such franchise. *Hall v. Cedar Rapids*, 88 N. W., of the city not only that the franchise is 488.

[By section 747-b, *supra*, all of the provisions of chapter 41 of the acts of the 29th G. A. (747-a, *supra*) are made applicable to cities under special charters, and for the provisions relating to water works trustees, their appointment, vacancies, removal, compensation, etc., see said section 747-a, *supra*.—Ed.]

**SEC. 955-a. Water works trustees—compensation.** That in cities having a population of thirty thousand or more acting under special charter the compensation of each member of the board of trustees of water works shall be five hundred dollars (\$500) per annum. [29 G. A., ch. 51, § 1.]

**SEC. 958. Other general powers.** Sections seven hundred and thirty-four to seven hundred and forty-one, inclusive, of chapter four; chapter five; and sections seven hundred and fifty-one to seven hundred and seventy-four, and seven hundred and seventy-seven to seven hundred and ninety-one, inclusive, chapter six, of this title are made applicable to cities acting under special charter. And wherever the words “board of supervisors,” “county auditor or recorder of deeds,” and “county treasurer,” are used in any section made applicable by chapter fourteen of title V of this code, to cities acting under special charters, the words “city council,” “city clerk or recorder,” and “city collector or treasurer,” shall be respectively substituted. [27 G. A., ch. 28, § 4.]

**SEC. 971. Notice and levy of special assessments.** After filing the plat and schedule referred to in section eight hundred and twenty-one, chapter seven, of this title, the council shall direct the clerk or recorder to give ten days' notice, by publishing same three times in a newspaper published in said city, that such plat and schedule are on file in the office of the clerk, fixing a time within which all objections thereto or to the prior proceedings must be made in writing; and the council, having heard the objections and made necessary corrections, shall levy the special assessment as shown in such plat and schedule. [25 G. A., ch. 7, §§ 11, 18; 22 G. A., ch. 5, § 6; 22 G. A., ch. 6, § 5; 21 G. A., ch. 168, §§ 11, 19.] [27 G. A., ch. 28, § 3.]

**SEC. 979. Other provisions as to special assessments.** Sections eight hundred and twenty-eight, eight hundred and thirty-two, eight hundred and thirty-three, eight hundred and thirty-four, eight hundred and thirty-five, and eight hundred and forty, chapter seven, of this title, are made applicable to cities under special charter. [27 G. A., ch. 28, § 5.]

**SEC. 984. Personal debt—action to enforce.**

The provision of § 479 of the Code of '73 held applicable only to a suit by the city. *Des Moines Brick Mfg. Co. v. Smith*, 108-307. expenses of collection, where the assessment is collected by suit against the owner,

**SEC. 989. Limitation of action.**

This section is not to be given a retrospective operation. *Waples v. Dubuque*, 89 N. W., 194.

**SEC. 999. Condemnation of land.**

[For earlier annotations, see code, page 389.—Ed.]

Under this section a city, acting under special charter, has power to acquire land by condemnation for a public landing. *Diamond Jo Line Steamers v. Davenport*, 114-432.

**SEC. 1004. Other provisions as to levying taxes.** Sections eight hundred and eighty-eight, eight hundred and eighty-nine, eight hundred and ninety, eight hundred and ninety-one, eight hundred and ninety-two and eight hundred and ninety-three, of chapter eleven, of this title, section thirteen hundred and seventy (1370), section thirteen hundred and seventy-one (1371) as amended by chapter thirty-three of the acts of the twenty-seventh general assembly, section thirteen hundred and seventy-two (1372) as amended by chapter thirty of the acts of the twenty-seventh general assembly, and section thirteen hundred and seventy-three (1373), of chapter one of title seven, are made applicable to cities under special charter, except that the words "city treasurer" or "collector," and "city" shall be substituted for "county auditor" or "county," wherever the same appear in said sections. [29 G. A., ch. 52, § 1.]

**SEC. 1005. Special taxes.** They shall have power to levy annually the following taxes for special purposes:

1. *Grading fund.* A tax not exceeding three mills on the dollar for a grading fund, to be used for the purpose of opening, widening, extending or grading any street, public ground or market place; [23 G. A., ch. 5, § 1; 21 G. A., ch. 160, §§ 2, 3; 20 G. A., ch. 20, § 5.]

2. *Improvement fund.* A tax not exceeding three mills on the dollar for the city improvement fund, to be used for the purpose of paying the cost of the making, reconstruction and repair of any street improvement at the intersection of streets, and spaces opposite streets intersecting but not crossing, and the spaces opposite property owned by the city or state; [25 G. A., ch. 8, § 1; 22 G. A., ch. 12, § 1; 21 G. A., ch. 160, §§ 2, 3; 19 G. A., ch. 38, §§ 1, 2.]

3. *Sewer fund.* A tax not exceeding three mills on the dollar on the assessed valuation of all property therein, for the city sewer fund, to be used to pay the cost of making, reconstructing or repairing any sewer at the intersection of streets, and all spaces opposite streets intersecting but not crossing, and at spaces opposite property owned by the city or state, or to pay the whole or any part of the cost of making, reconstructing or repairing any sewer within the limits of such city. When the city has been divided into sewer districts, a tax not exceeding five mills on the taxable real property in the sewer district, for the district sewer fund, to be used to pay, in whole or in part, the cost of the making, reconstruction or repair of any sewer located or laid in that particular district: *provided* that, on petition of the owners of two-thirds in value of all the taxable real estate within such sewer district for the construction of a sewer in such district, then the maximum percentage of taxes that can be levied in any one year shall not be limited to five mills, but shall be such percentage of the valuation of such property as will produce at least one-tenth of the whole cost of such sewer assessable upon the real property in such district; [25 G. A., ch. 7, § 11; 22 G. A., ch. 7, § 1; 21 G. A., ch. 34, § 1; 17 G. A., ch. 162, § 1; 16 G. A., ch. 107, § 1.]

4. *Fire fund.* A tax not exceeding three mills on the dollar for the purpose of creating a city fire fund, to be used for paying the expenses of organizing, keeping and maintaining a fire department, including the expenses of constructing, purchasing, leasing and maintaining the proper and necessary buildings, grounds and apparatus therefor; [26 G. A., ch. 27; 23 G. A., ch. 8, §§ 1, 2.]

5. *Road fund.* When any city is divided into road districts, a tax not exceeding two mills on the dollar on all taxable property in such road district, to be known as the district road fund, and to be used only to pay the cost of cleaning, sprinkling and repairing the streets and public places in such district;

6. *Library tax.* In cities which have established, or may establish, a free public library, a tax as provided in section seven hundred and thirty-two (732) and amendments thereto; [25 G. A., ch. 43, § 1; 25 G. A., ch. 99, § 2;

22 G. A., ch. 18, § 1; 14 G. A., ch. 17; 13 G. A., ch. 45; C. '73, § 461.] [29 G. A., ch. 50, § 2.]

7. *Tax for water and gas works and electric plants.* A tax not exceeding five mills on the dollar, which, with the rates, rents or revenues derived therefrom, shall be sufficient to pay the expenses of running, operating and repairing, water and gas works, electric light and power plants, owned and operated by such city, and the interest on or principal of any bonds issued to pay the cost of the construction of such works; but such taxes shall not be levied upon the property which lies wholly without the limits of the benefits or protection of such works or plants, which limit shall be fixed by the council each year before making the levy; [22 G. A., ch. 11, § 2; C. '73, § 475.]

8. *Tax for water, gas and electric light or power.* A tax, not exceeding five mills on the dollar for the purpose of paying the amount due, or to become due, to any individual or company operating water or gas works or electric light power plants, for water, light, gas or power supplied to the city, the levy to be limited to the property benefited thereby; [22 G. A., ch. 11, § 2; C. '73, § 475.]

9. *Bond fund.* A tax for the purpose of creating a bond fund sufficient to pay the interest, to accrue before the next annual levy, on funding or refunding bonds outstanding, and to pay the principal of such funding or refunding bonds. In case of such bonds, the levy shall be so made that, dividing the principal into as many parts as the bonds have years to run, not less than one such part shall be levied each year, and shall be made so that the fund derived therefrom shall be available and sufficient to pay the bonds at their maturity; [24 G. A., ch. 14, § 5; 23 G. A., ch. 4, §§ 6, 7; 22 G. A., ch. 17, § 5; 21 G. A., ch. 78.]

10. *Water and gas or electric light and power bonds.* A tax to be used exclusively in payment of the principal and interest of bonds issued for the construction of water and gas works, electric light and power plants, and which shall be levied in the manner provided in the preceding subdivision; [23 G. A., ch. 13, § 1; 22 G. A., ch. 10, § 1.]

11. *Park tax.* A tax not exceeding two mills on the dollar, as authorized by the vote of the electors, to purchase, improve and maintain public parks in such city; [24 G. A., ch. 1, § 7.]

12. *Special bridge tax.* A special tax to aid in the construction of bridges, when such tax has been voted by the electors of the city under the provisions of section seven hundred and sixty, of chapter six, of this title. [25 G. A., ch. 19, § 2; 21 G. A., ch. 13, § 2; 19 G. A., ch. 63, § 3.] [27 G. A., ch. 29, § 1.]

A statutory provision, not retained in the Code, provided that property paying special assessments for street improvements might be exempted from road tax. Held that the repeal of such provision by the adoption of the Code left the property subject to taxation under the provisions of this section. *Miller v. Hageman*, 114-195.

**SEC. 1020. Questioning deed—refund.** Sections fourteen hundred and six, fourteen hundred and seven, fourteen hundred and eight, fourteen hundred and twenty-three, fourteen hundred and thirty-four, fourteen hundred and forty-six, fourteen hundred and forty-seven and fourteen hundred and forty-eight, chapter two, title seven, of this code are hereby made applicable to cities acting under special charters except that, where the word "treasurer" is used, there shall be used the words "city collector or treasurer or deputy treasurer or deputy or officer authorized to collect city taxes." And where the word auditor is used, there shall be substituted the words, "city clerk or recorder." [27 G. A., ch. 28, § 6.]

**SEC. 1050. Notice of unliquidated claim—limitation of action.**

The limitations provided for by this section held not to be retroactive in effect. *Thoeni v. Dubuque*, 88 N. W., 967.

**SEC. 1051. Notice of claim for personal injury—limitation.**

<p>Reasonable certainty as to the place is all that is required in the notice. <i>Rush v. Dubuque</i>, 90 N. W., 80.</p>	<p>special charter. <i>Harvey v. Clarinda</i>, 111-528.</p>
<p>This section applies only to cities under</p>	<p>For similar provisions as to other cities, see notes to Sec. 3447, Par. 1.</p>



The signature of the applicant shall be made at the right hand end of the line under the column "Signature," one of the registers having first administered to him this form of oath: "You do solemnly swear (or affirm) that you will fully and truly answer all such questions as shall be put to you touching your place of residence, name, place of birth, your qualifications as an elector, and your right as such to register and vote under the laws of this state"; after which, the registers, or either of them, shall propound questions to the applicant for registration in relation to his name; his then place of residence, street and number; how long he has resided in the precinct where the vote is claimed; the last place of his residence before coming into that precinct; and also as to his citizenship, whether native or naturalized; if the latter, when, where, and in what court, or before what officer, or whether by act of congress; whether he came into the precinct for the purpose of voting at that election; how long he contemplates residing in the precinct; and such other questions as may tend to test his qualifications as a resident of the precinct, citizenship and right to vote at the poll; then, if the applicant appears to have the right to be registered, the registers shall fill out the above prescribed form of statement, which the applicant shall sign and swear to, as above provided. [22 G. A., ch. 48, § 1; 21 G. A., ch. 161, § 5.] [28 G. A., ch. 33, § 1.]

[For annotations, see code, page 405.—Ed.]

### CHAPTER 3.

#### OF ELECTIONS.

##### SECTION 1089.

The Australian ballot law as originally adopted (24 G. A., ch. 33) did not apply to special elections held for the purpose of voting taxes in aid of railroads or bridges. *Pritchard v. Magoun*, 109-364; *Bras v. Burlington, C. R. & N. R. Co.*, 114-401.

##### SEC. 1090. Election precincts.

[For earlier annotations, see code, pages 408-9—Ed ]

Evidence in a particular case as to the actual residence of a voter considered. *Kelso v. Wright*, 110-560.

**SEC. 1096. Polls open.** At all elections the polls shall be opened at eight o'clock in the forenoon, except in cities where registration is required, when the polls shall be opened at seven o'clock in the forenoon, or in each case as soon thereafter as vacancies in the places of judges or clerks of election have been filled. In all cases the polls shall be closed at seven o'clock in the evening. [24 G. A., ch. 33, § 32; C. '73, § 611; R., § 486; C, '51, § 251.] [28 G. A., ch. 34, § 1.]

**SEC. 1106. Ballot—form—separate ballot for constitutional amendments, etc.** The names of all candidates to be voted for in each election precinct shall be printed on one ballot, all nominations of any political party or group of petitioners being placed under the party name or title of such party or group, as designated by them in their certificates of nomination or petitions, or, if none be designated, then under some suitable title, and the ballot shall contain no other names, except that, in case of electors for president and vice-president of the United States, the names of the candidates for president and vice-president may be added to the party or political designation. Each list of candidates for the several parties and groups of petitioners shall be placed in a separate column on the ballot, in such order as the authorities charged with the printing of the ballots shall decide, except as otherwise provided, and be called a ticket. But the name of no candidate shall appear upon the ballot in more than one place for the same office,

whether nominated by convention, primary, caucus or petition. Where two or more conventions, primaries or caucuses, or any two of them, may nominate the same candidate for any office, the name of such candidate shall be printed under the name of the party first filing nomination papers bearing such name, unless the candidate himself shall, in writing duly verified, request the officer with whom the nomination papers are filed to cause the name to be printed upon some other ticket. Each of the columns containing the list of candidates, including the party name, shall be separated by a distinct line. Said ballot shall be substantially in the following form:

<input type="radio"/> REPUBLICAN. For Governor, <input type="checkbox"/> A.....B..... of.....County. For Lieutenant Gov- ernor, <input type="checkbox"/> C.....D..... of.....County. For Judge of Supreme Court, <input type="checkbox"/> E.....F..... of.....County.	<input type="radio"/> DEMOCRATIC. For Governor, <input type="checkbox"/> G.....H..... of.....County. For Lieutenant Gov- ernor, <input type="checkbox"/> I.....J..... of.....County For Judge of Supreme Court, <input type="checkbox"/> K.....L..... of.....County.	<input type="radio"/> PROHIBITION. For Governor, <input type="checkbox"/> M.....N..... of.....County. For Lieutenant Gov- ernor, <input type="checkbox"/> O.....P..... of.....County. For Judge of Supreme Court, <input type="checkbox"/> Q.....R..... of.....County.	<input type="radio"/> UNION LABOR For Governor, <input type="checkbox"/> S.....T..... of.....County. For Lieutenant Gov- ernor, <input type="checkbox"/> U.....V..... of.....County. For Judge of Supreme Court, <input type="checkbox"/> W.....X..... of.....County.
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When a constitutional amendment or other public measure is to be voted upon by the electors, it shall be printed in full upon a separate ballot, preceded by the words, "Shall the following amendment to the constitution (or public measure) be adopted?" and upon the right hand margin, opposite these words, two spaces shall be left, one for votes favoring such amendment or public measure, and the other for votes opposing the same. In one of these spaces the word "yes" or other word required by law shall be printed; in the other, the word "no" or other word required, and to the right of each space a square shall be printed to receive the voting cross, all of which shall be substantially in the following form:

"Shall the following amendment to the constitution (or public measure) be adopted?"

(Here insert in full the proposed constitutional amendment or public measure.)

Yes,	
No.	

The elector shall designate his vote by a cross mark, thus X, placed in the proper square. At the top of such ballots shall be printed the following words, enclosed in brackets: [Notice to voters. For an affirmative vote upon any question submitted upon this ballot make a cross (x) mark in the square after the word "Yes." For a negative vote make a similar mark in the square following the word "No."] If more than one constitutional amendment or public measure is to be voted upon, they shall be printed upon the same ballot, one below the other, with one inch space between each constitutional amendment or public measure that is to be submitted. All of such ballots for the same polling-place shall be of the same size, similarly printed, upon yellow colored paper. On the back of each such ballot shall be printed appropriate words, showing that such ballot relates to a constitutional or other question to be submitted to the electors, so as to distinguish the said ballots from the official ballot for candidates for office, and a *fac simile* of the signature of the auditor or other officer who has caused the ballot to be printed. Such ballots shall be endorsed and given to each voter by the judges of election, as provided in section eleven hundred and sixteen (1116), and shall be subject to all other laws governing ballots for candidates, so far as the same shall be applicable. [26 G. A., ch. 68, §§ 14, 16; 24 G. A., ch. 33, §§ 11-13.] [28 G. A., ch. 35, § 1.]

**SEC. 1117. Depositing ballots.**

A ballot not bearing the endorsement of the judge should not be counted. *Kelso v. Wright*, 110-560.

**SEC. 1119. Marking the ballot.** Upon retiring to the voting booth, the voter shall prepare his ballot by placing a cross in the square opposite the name of each candidate for whom he desires to vote, or, if he desires to vote for all the candidates upon any ticket, he may do so by placing a cross in the circle at the head of the ticket. The voter may also insert in writing, in the proper place, the name of any person for whom he desires to vote, making a cross opposite thereto. The writing of such name without making a cross opposite thereto, or the making a cross opposite such blank without writing a name therein, or the unnecessary marking of a cross in a square below a marked circle, shall not affect the validity of his vote. [24 G. A., ch. 33, § 22.] [28 G. A., ch. 36, § 1.]

[For earlier annotations, see code, pages 417-418.—Ed.]

The law does not recognize the writing the proper place, with a cross in the square opposite the name as written. *Voorhees v. Arnold*, 108-77.

**SEC. 1120. How counted.**

[For earlier annotations, see code, page 418.—Ed.]

The law by implication prohibits any person, including the voter, from so marking the ballot that the mark may be used for the purpose of identification, and a ballot so marked should be rejected. The unauthorized marks, to be objectionable as identification marks, must be deliberately made, and not merely accidentally, or as the result of inexperience. Whether the marks in particular cases are identification marks is for the jury. The question is whether there has been a deliberate departure in the marking, and in a way that might enable the marks to be used to identify the ballot. *Voorhees v. Arnold*, 108-77.

What constitutes an identifying mark upon a ballot is generally a question of fact for the trial court, and its finding, or the finding of a jury, if the case is submitted to a jury, is conclusive upon appeal. The unnecessary marking of a cross in the square below the marked circle does not affect the validity of the ballot. *Kelso v. Wright*, 110-560.

The amendment of this section, made by 28 G. A., chap. 36, held not applicable in a case tried and appealed before the amendment went into effect. *Morrison v. Pepperman*, 112-471.

Where a ballot had crosses in squares opposite all the names on the republican

ticket, except that of the candidate for township trustee, and as to that office had a cross on another ticket in front of a blank space, held that it was properly rejected. *Ibid.*

This section makes the cross in the circle effective as a vote for all names printed upon the ticket below it, and if as in front of the name of the candidate to any office there is a blank in such ticket, then a cross on another ticket for such office will authorize the counting of the ballot for the candidate thus designated. *Spurrier v. McLennan*, 88 N. W., 1062.

Whether unnecessary crosses in places where no provision for marking with a cross is made, as for instance in front of the names of the candidates for president and vice-president, constitute identifying marks such as to vitiate the ballot is a question of fact for the trial court. *Ibid.*

Where there is a cross in the circle marked at the head of one ticket, the marking of a cross in the square before the name on another ticket has no effect other than to nullify the vote for the officer thus doubly voted for. This rule is in no wise altered by the marking of the squares below the marked circle. *Ibid.*

**SEC. 1122. Defects in printed ballot.**

[For earlier annotations, see code pages 418-9.—Ed.]

The election law was enacted to aid the elector in expressing his free choice and not by technical obstructions to make the right of voting difficult and insecure. When the elector receives a ballot from the proper officials he may rely upon it as genuine and, when properly marked by him,

have it counted for all candidates for whom he had the right to vote and did vote. There is a distinction between errors of officers which would have the effect to deprive voters of the franchise and a disregard of the law by the electors themselves. *State v. Bernholtz*, 106-157.

**SEC. 1125. Special policemen.**

Special policemen, appointed by the city council on the nomination of political parties are not entitled to compensation either from the city or the county as the statute makes no provision for such compensation. *Mousseau v. Sioux City*, 113-246.

**SEC. 1129. Expenses.**

The provisions of this section do not cover compensation to special policemen appointed under Code § 1125. *Mousseau v. Sioux City*, 113-246.

**SEC. 1130. Ballot boxes.** The board of supervisors shall provide for each precinct in the county, for the purpose of elections, one box, with lock and key. When any township precinct includes a town or part thereof, together with territory outside the limits of such town, the township trustees shall prepare a separate ballot box to receive the votes for township assessor, which shall be on separate ballots, and only the ballots of persons living outside of the limits of such town shall be placed in said ballot box. The judges of election shall place each ballot in its proper ballot box. The judges of election shall have the right to administer an oath to any voter, and to examine him under oath as to the assessor for whom such elector is entitled to vote. [17 G. A., ch. 71, §§ 2, 3; C. '73, § 614; R., § 489; C. '51, § 254.] [29 G. A., ch. 53, § 2.]

**SEC. 1132. Registry and poll books.**

It is not required that the poll lists show in what town in the county the voter resides. *Porter v. Butterfield*, 89 N. W., 199.

## CHAPTER 3-A.

## OF ELECTIONS—VOTING MACHINES.

**SECTION 1137-a. Use of voting machines authorized.** That at all state, county, city, town, and township elections, hereafter held in the state of Iowa, ballots or votes may be cast, registered, recorded, and counted by means of voting machines, as hereinafter provided. [28 G. A., ch. 37, § 1.]

**SEC. 1137-b. Board of supervisors to purchase, etc.** Hereafter the board of county supervisors of any county, or the council of any incorporated city or town, in the state of Iowa may, by a two-thirds vote, authorize, purchase, and order the use of voting machines in any one or more voting precincts within said county, city, or town, until otherwise ordered by said board of county supervisors or city or town council. [28 G. A., ch. 37, § 2.]

**SEC. 1137-c. Commissioners—term—removal.** Within thirty days after this act goes into effect, the governor shall appoint three commissioners and not more than two of whom shall be from the same political party. The said commissioners shall hold office for the term of five years, subject to removal at the pleasure of the governor. [28 G. A., ch. 37, § 3.]

**SEC. 1137-d. Examination of machine—report of commissioners—compensation.** Any person or corporation owning or being interested in any voting machine may call upon the said commissioners to examine the said machine, and make report to the secretary of state upon the capacity of the said machine to register the will of voters, its accuracy and efficiency, and with respect to its mechanical perfections and imperfections. Their report shall be filed in the office of the secretary of state and shall state whether in their opinion the kind of machine so examined can be safely used by such voters at elections under the conditions prescribed in this act. If the report states that the machine can be so used, it shall be deemed approved by the commissioners, and machines of its kind may be adopted for use at elections as herein provided. Any form of voting machine not so approved cannot be

used at any election. Each commissioner is entitled to one hundred and fifty dollars for his compensation and expenses in making such examination and report, to be paid by the person or corporation applying for such examination. No commissioner shall have any interest whatever in any machine reported upon. Provided, that said commissioner shall not receive to exceed fifteen hundred dollars and reasonable expenses in any one year; and all sums collected for such examinations over and above said maximum salaries and expenses shall be turned into the state treasury. [28 G. A., ch. 37, § 4.]

**SEC. 1137-e. Provisions as to construction of machine approved.**

A voting machine approved by the state board of voting machine commissioners must be so constructed as to provide facilities for voting for the candidates of at least seven different parties or organizations, must permit a voter to vote for any person for any office although not nominated as a candidate by any party or organization, and must permit voting in absolute secrecy. It must also be so constructed as to prevent voting for more than one person for the same office, except where the voter is lawfully entitled to vote for more than one person for that office; and it must afford him an opportunity to vote for any or all persons for that office as he is by law entitled to vote for and no more, at the same time preventing his voting for the same person twice. It may also be provided with one ballot in each party column or row containing only the words "presidential electors" preceded by the party name, and a vote for such ballot shall operate as a vote for all the candidates of such party for presidential electors. Such machine shall be so constructed as to accurately account for every vote cast upon it. [28 G. A., ch. 37, § 5.]

**SEC. 1137-f. Experimental use.** The board of supervisors of any county, the council of any city or town, may provide for the experimental use at an election in one or more districts, of a machine which it might lawfully adopt, without a formal adoption thereof; and its use at such election shall be as valid for all purposes as if it had been lawfully adopted. [28 G. A., ch. 37, § 6.]

**SEC. 1137-g. Duties of local authorities.** The local authorities adopting a voting machine shall, as soon as practical thereafter, provide for each polling place one or more voting machines in complete working order, and shall thereafter keep them in repair, and shall have the custody thereof and of the furniture and equipment of the polling place when not in use at an election. If it shall be impracticable to supply each and every election district with a voting machine or voting machines at any election following such adoption, as many may be supplied as it is practicable to procure, and the same may be used in such election district or districts within the county, city, or town as the officers adopting the same may direct. [28 G. A., ch. 37, § 7.]

**SEC. 1137-h. Bonds, certificates of indebtedness, etc.** The local authorities, on the adoption and purchase of a voting machine, may provide for the payment therefor in such manner as they may deem for the best interest of the locality, and may for that purpose issue bonds, certificates of indebtedness, or other obligations which shall be a charge on the county, city, or town. Such bonds, certificates, or other obligations may be issued with or without interest, payable at such time or times as the authorities may determine, but shall not be issued or sold at less than par. [28 G. A., ch. 37, § 8.]

**SEC. 1137-i. Ballots—form.** All ballots shall be printed in black ink on clear, white material, of such size as will fit the ballot frame, and in plain, clear type as the space will reasonably permit. The party name for each political party represented on the machine shall be prefixed to the list of candidates of such party. The order of the list of candidates of the several parties or organizations shall be arranged as provided in section eleven hundred and six (1106) of the code, except that the lists may be arranged in horizontal rows or vertical columns. [28 G. A., ch. 37, § 9.]

**SEC. 1137-j. Sample ballots.** The officers or board charged with the duty of providing ballots for any polling-place shall provide therefor two sample ballots, which shall be arranged in the form of a diagram showing the entire front of the voting machine as it will appear after the official ballots are arranged for voting on election day. Such sample ballots shall be open to public inspection at such polling-place during the day of election and the day next preceding election day. [28 G. A., ch. 37, § 10.]

**SEC. 1137-k. Two sets of ballots.** Two sets of ballots shall be provided for each polling-place for each election for use in the voting machine. [28 G. A., ch. 37, § 11.]

**SEC. 1137-l. Delivery of ballots.** The ballots and stationery shall be delivered to the election board of each election district before ten o'clock in the forenoon of the day next preceding the election. [28 G. A., ch. 37, § 12.]

**SEC. 1137-m. Duties of election officers—independent ballots.** The judges of election and clerks of each district shall meet at the polling-place therein, at least three-quarters of an hour before the time set for the opening of the polls at each election, and shall proceed to arrange within the guard-rail the furniture, stationery, and voting machines for the conduct of the election. The judges of election shall then and there have the voting machine, ballots, and stationery required to be delivered to them for such election; and, if it be an election at which registered voters only can vote, the registry of such electors required to be made and kept therefor. The judges shall thereupon cause at least two instruction cards to be posted conspicuously within the polling-place. If not previously done, they shall arrange, in their proper place on the voting machine, the ballots containing the names of the offices to be filled at such election, and the names of the candidates nominated therefor. If not previously done, the machine shall be so arranged as to show that no vote has been cast, and the same shall not be thereafter operated, except by electors in voting. Before the polls are open for election, each judge shall carefully examine every machine and see that no vote has been cast, and the same shall be subject to inspection of the election officers. Ballots voted for any person, whose name does not appear on the machine as a nominated candidate for office, are herein referred to as independent ballots. Where two or more persons are to be elected to the same office, and the machine requires that all independent ballots voted for that office be deposited in a single receptacle or device, an elector may vote in or by such receptacle or device for one or more persons whose names do not appear upon the machine with or without the names of one or more persons whose names do so appear. With that exception, and except for presidential electors, no independent ballot shall be voted for any person for any office whose name appears on the machine as a nominated candidate for that office; any independent ballot so voted shall not be counted. An independent ballot must be cast in its appropriate place on the machine, or it shall be void and not counted. [28 G. A., ch. 37, § 13.]

**SEC. 1137-n. Voting machine in plain view—guard-rail.** The exterior of the voting machine and every part of the polling-place shall be in plain view of the election officers. The voting machine shall be placed at least three feet from every wall and partition of the polling-place, and at least three feet from the guard-rail, and at least four feet from the clerk's table. A guard-rail shall be constructed at least three feet from the machine, with openings to admit electors to and from the machine. [28 G. A., ch. 37, § 14.]

**SEC. 1137-o. Method of voting.** After the openings of the polls, the judges shall not allow any voter to pass within the guard-rail until they ascertain that he is duly entitled to vote. Only one voter at a time shall be permitted to pass within the guard-rail to vote. The operating of the voting machine by the elector while voting shall be secret and obscured from all other persons except as provided by this chapter in cases of voting by

assisted electors. No voter shall remain within the voting machine booth longer than one minute, and if he shall refuse to leave it after the lapse of one minute, he shall be removed by the judges. [28 G. A., ch. 37, § 15.]

**SEC. 1137-p. Additional instructions.** In case any elector after entering the voting machine booth shall ask for further instructions concerning the manner of voting, two judges of opposite political parties shall give such instructions to him; but no judge or other election officer or person assisting an elector shall in any manner request, suggest, or seek to persuade or induce any such elector to vote any particular ticket, or for any particular candidate, or for or against any particular amendment, question, or proposition. After receiving such instructions, such elector shall vote as in the case of an unassisted voter. [28 G. A., ch. 37, § 16.]

**SEC. 1137-q. Injury to the machine.** No voter, or other person, shall deface or injure the voting machine or the ballot thereon. It shall be the duty of the judges to enforce the provisions of this section. During the entire period of an election, at least one of their number, designated by them from time to time, shall be stationed beside the entrance to the booth and shall see that it is properly closed after a voter has entered it to vote. He shall also, at such intervals as he may deem proper or necessary, examine the face of the machine to ascertain whether it has been defaced, or injured, to detect the wrong-doer and to repair any injury. [28 G. A., ch. 37, § 17.]

**SEC. 1137-r. Canvass of vote.** As soon as the polls of the election are closed, the judges of the election thereat shall immediately lock the voting machine against voting and open the counting compartments in the presence of all persons who may be lawfully within the polling-place, and proceed to canvass the vote. [28 G. A., ch. 37, § 18.]

**SEC. 1137-s. Judges to lock machine.** The judges of election shall, as soon as the count is completed and fully ascertained as in this act required, lock the machine against voting, and it shall so remain for the period of thirty days. Whenever independent ballots have been voted, the judges shall return all of such ballots properly secured in a sealed package as prescribed by section eleven hundred and forty-two (1142) of the code. [28 G. A., ch. 37, § 19.]

**SEC. 1137-t. Written statements of election.** After the total vote for each candidate has been ascertained, and before leaving the room or voting place, the judges shall make and sign written statements of election, as required by the election laws now in force, except that such statements of the canvass need not contain any ballots except the independent ballots as herein provided. [28 G. A., ch. 37, § 20.]

**SEC. 1137-u. What statutes apply.** All of the provisions of the election law now in force and not inconsistent with the provisions of this act shall apply with full force to all counties, cities, and towns adopting the use of voting machines. Nothing in this act shall be construed as prohibiting the use of a separate ballot for constitutional amendments and other public measures. [28 G. A., ch. 37, § 21.]

[The above sections 1137-a to 1137-u inclusive are sections 1 to 21 inclusive of chapter 37 of the acts of the 28th G. A. By the title to said act, it was made additional to chapter 3, title VI, of the code, and it is deemed best to insert them here in a chapter by themselves.—Ed.]

## CHAPTER 4.

### OF THE CANVASS OF VOTES.

#### SECTION 1142. Proclamation of result—preservation of votes.

[For earlier annotations, see code, page 423.—Ed.]

The poll books and registration lists best evidence as to who cast ballots prepared as provided by law furnish the at the election. So held where the question

was as to the sufficiency of the petition of consent under the mulct tax law. *State v. Pressman*, 103-449.

The law provides for the strictest vigilance in the care and preservation of the ballots, and where it appears that these precautions have not been observed and there has been opportunity to tamper with them they will not be considered in an election contest for the purpose of overthrowing the result of the canvass by the proper officers. *Davenport v. Olerich*, 104-194.

The duty of preserving the ballots is not a negative one of non-interference, but a positive requirement to do whatever may be necessary in order to accomplish the purposes of the law in keeping them inviolate. *Ibid.*

The ballots when properly authenticated afford the very best evidence of who has been chosen by the electors to an office, but in order that the result of the canvass shall be overturned by the evidence of such ballots it must appear that they have been preserved with that care which precludes the suspicion of having been tampered with and the opportunity of alteration or change, and in a particular case, held, that it appeared that there had been

such opportunity for tampering with the ballots that they should not be considered for the purpose of overturning the result as announced by the canvassing board. *Ibid.*

The ballots should be preserved in such way as not to afford a reasonable possibility of their having been changed or tampered with by unauthorized persons. *Mentzer v. Davis*, 109-528.

As the manner and mode of preservation of ballots has been enjoined by statute, a substantial compliance therewith must be shown preliminary to the introduction of the ballots in evidence. This preliminary proof, unless waived, is essential to the competency of the ballots as evidence for any purpose as against the official count, and no averment in the pleading is required as a basis for an objection to their competency. *DeLong v. Brown*, 113-370.

The question of the competency of the ballots as evidence is one of fact to be determined by the trial court. *Ibid.*

Where it appeared that the ballots had been so kept that they might have been tampered with, held that they were not admissible. *Ibid.*

#### SEC. 1145. Poll books returned and preserved.

Previous to the time when the poll books are directed to be destroyed they may be used by the board of supervisors in determining whether the number of signers to

a petition of consent for the sale of intoxicating liquors is sufficient. *Cameron v. Fellows*, 109-534.

#### SEC. 1149. Canvass by board of supervisors.

[For earlier annotations, see code, pages 424-5.—Ed.]

The judges of election who have made defective returns may correct such returns so as to authorize the board of supervisors

to canvass the same. *Rummel v. Dealy*, 112-503.

### CHAPTER 5.

#### OF PRESIDENTIAL ELECTORS.

**SECTION 1173. Election of.** At the general election in the years of the presidential election, or at such other times as the congress of the United States may direct, there shall be elected by the electors of the state, one person from each congressional district into which the state is divided, as elector of president and vice-president, and two from the state at large, no one of whom shall be a person holding the office of senator or representative in congress, or any office of trust or profit under the United States. Such election shall be conducted, and the canvass of the votes and the returns thereof made, in the same manner as for state officers and representatives in congress. [16 G. A., ch. 23; C. '73, §§ 659, 660; R., §§ 535-6; C. '51, §§ 301-2.] [28 G. A., ch. 38, § 1.]

See U. S. Const., art. II, § 1.

## CHAPTER 6.

## OF QUALIFICATION FOR OFFICE.

**SECTION 1177. Oath and bond.**

[For earlier annotations, see code, page 429 —Ed.]

One who is elected to an office, but does not qualify nor act, is not an officer *de facto*. *Herkimer v. Keeler*, 109-680.

**SEC. 1177-a. Bond.** When a bond is required by law to be given by or for any public officer, deputy or employe of such public officer, or by any person holding a fiduciary office or trust, administrator, executor, guardian, trustee, officer or employe of any public or private corporation or association, when not otherwise specifically provided, shall be conditioned as provided in section eleven hundred eighty-three (1183) of the code. [29 G. A., ch. 54, § 1.]

**SEC. 1177-b. Sureties relieved—how.** If any surety on said bond shall so elect his liability thereon may be canceled at any time by giving thirty days' notice in writing to the person or persons authorized to approve said bond, and to the officer or person with whom the same is required to be filed or deposited by law, and refunding the premium paid, if any, less a pro rata part thereof for the time said bond shall have been in force. The liability and indemnity created by said bond shall extend to the date of cancellation as provided by chapter eleven (11), title six (VI) of the code. [29 G. A., ch. 54, § 2.]

**SEC. 1177-c. Contract or stipulation.** No contract, stipulation, or condition limiting the liability created by said bond shall be of any force or validity. [29 G. A., ch. 54, § 3.]

**SEC. 1177-d. Other bonds.** All other bonds, public or private, required to be given by law, when not otherwise specifically provided, shall be substantially conditioned as required in this act and subject to the limitations thereof. [29 G. A., ch. 54, § 4.]

**SEC. 1183. Bond required.**

[For earlier annotations, see code, pages 430-2.—Ed ]

The sureties of a county treasurer are liable for money in his hands at the expiration of his term which is subsequently converted by him before his successor comes into office, and not paid over to such successor. *Plymouth County v. Kerseboom*, 108-304.

**SEC. 1193. Accounting before approval.**

[For earlier annotations, see code, pages 434-5.—Ed.]

Where an officer has accounted, as required by law, and produced the funds and property with which he is chargeable, the settlement with him, in the absence of fraud or mistake, is conclusive, not only as against him, but also as against his sureties, and the burden is cast on the sureties to show his failure to produce funds, and that such funds were misappropriated prior to the taking effect of the bond on which they are sureties. But the sureties are not estopped from showing that the defalcation for which they are sought to be charged in fact occurred prior to the making of such settlement, if at the time of settlement the funds were not in fact produced. *Independent School Dist. v. Hubbard*, 110-58.

## CHAPTER 7.

## OF CONTESTING ELECTIONS.

**SECTION 1198. Grounds of contest.**

[For earlier annotations, see code, page 436 —Ed ]

The provisions of this section are cumulative, and not exclusive of those authorized

by Code § 4313 to test the right of an incumbent of a county office to hold the same. *Haverstock v. Aylesworth*, 113-378.

Voters at an election in a township for

which defective returns are made may by action of mandamus compel the board of supervisors to canvass corrected returns. *Rummel v. Dealy*, 112-503.

### SEC. 1203. Statement of contest.

[For earlier annotations, see code, page 437.—Ed.]

The provisions of this section as to what the statement of contest must show have reference to the paper filed by the contestant as the basis for his proceedings,

and it is doubtful whether they apply to the answer filed by the incumbent. *Kelso v. Wright*, 110-560.

### SEC. 1208. Procedure—powers of court.

[For earlier annotations, see code, page 436.—Ed.]

The proceedings in contest cases should be assimilated to those in an action so far as practicable, and the defendant, that is, the incumbent in such a contest, is not required, as a general rule, to give bond. *Kelso v. Wright*, 110-560.

The incumbent may meet the case made by the contestant by showing that the illegal votes counted for him were without prejudice because of the illegal votes cast for the contestant. *Ibid.*

**SEC. 1222. Appeal.** The party against whom judgment is rendered may appeal within twenty days to the district court, but, if he be in possession of the office, such appeal will not supersede the execution of the judgment of the court as provided in the preceding section, unless he gives a bond, with security to be approved by the district judge, in a sum to be fixed by him, and which shall be at least double the probable compensation of such officer for six months, which bond shall be conditioned that he will prosecute his appeal without delay, and that, if the judgment appealed from be affirmed, he will pay over to the successful party all compensation received by him while in possession of said office after the judgment appealed from was rendered. The court shall hear the appeal in equity and determine anew all questions arising in the case. [C. '73, § 716.] [28 G. A., ch. 39, § 1.]

[For earlier annotations, see code, page 439 —Ed.]

After the judges of contest have in fact announced their decision, the notice of appeal may be served although the decision has not yet been formally reduced to writing and filed with the proper authorities. *Mentzer v. Davis*, 109-528.

The statute does not require the giving of bond where no stay of proceedings is sought. *Ibid.*

Ballots should not be received in evidence unless they have been so kept as not to be exposed to the reach of unauthorized persons in such a way as to afford a reasonable possibility of their having been changed or tampered with. *Ibid.* And see notes to § 1142.

The fact that contestant claims that the returns for a certain township or precinct were not such as to entitle the votes from that precinct to be counted will not prevent a determination of the contest by a recounting of votes of which proper returns were made. *Brown v. Crosson*, 88 N. W., 366.

The proceedings before the board are not binding on the court hearing the appeal. *Ibid.*

The supreme court does not on appeal in an election contest try the case *de novo*, but only upon errors assigned. *Spurrier v. McLennan*, 88 N. W., 1062.

## CHAPTER 8.

### OF REMOVAL FROM OFFICE.

#### SECTION 1251. Causes.

Misconduct during a preceding term of office may be ground for the removal of a sheriff. *State v. Welsh*, 109-19.

The neglect of duty must be habitual or wilful to require removal. *Ibid.*

Voluntary intoxication while engaged in the performance of an official duty is such wilful misconduct as to be a ground for removal. *Ibid.*

## CHAPTER 10.

## OF VACANCIES IN OFFICE.

**SECTION 1265. Holding over.**

[For earlier annotations, see code, page 445.—Ed.]

Where the council of a city met at the time fixed by ordinance to elect a street commissioner and without doing so adjourned without date, held that the incumbent who thereafter gave bond as a holdover officer was entitled to the office as against a person elected at a subsequent meeting of the council. *State v. Alexander*, 107-177.

**SEC. 1266. What constitutes vacancy.**

[For earlier annotations, see code, page 445.—Ed.]

The office of justice of the peace becomes vacant if the incumbent becomes a resident of another state. *State v. Hemsworth*, 112-1. But mere temporary residence for a short time in another township does not operate to create a vacancy. *Ibid.*

## CHAPTER 11.

## OF ADDITIONAL SECURITY AND THE DISCHARGE OF SURETIES.

**SECTIONS 1280-1288.**

[For provisions relating to the release of sureties from an obligation, and manner of procedure, as enacted by the 29th G. A., ch 54, §§ 1, 2, 3 and 4 and made amendatory of this chapter, see sections 1177-a, 1177-b, 1177-c and 1177-d, *supra*.—Ed.]

## CHAPTER 12.

## OF GENERAL PROVISIONS AS TO COMPENSATION.

**SECTION 1290-a. Appraisers—compensation of generally.** That the compensation of appraisers appointed to appraise property belonging to any estate as a basis for the assessment of the collateral inheritance tax and in all other cases where the compensation of appraisers is not now fixed by statute, shall be two dollars (\$2.00) per day for each appraiser and five cents a mile for the distance traveled in going to and returning from the place of appraisement, to be paid out of the property appraised or by the owner or owners thereof. [29 G. A., ch. 55, § 1.]

**SEC. 1297. Taking higher fees.**

[For earlier annotations, see code, page 450.—Ed.]

While the compensation of a public officer cannot be affected by contract, yet, if a city provides for a police matron without regard to the statutory provisions as to such office, it may fix the compensation by contract. *Daniels v. Des Moines*, 108-484.

**SEC. 1298. Fees paid in advance.**

[For earlier annotations, see code, page 450.—Ed.]

A witness for the defendant in a criminal prosecution is not bound to attend without prepayment of fees, unless the subpoena is issued under the order of the judge, as provided in this section. *State v. Keenan*, 111-286.

**SEC 1299. Fee bill.**

[For earlier annotations, see code, page 451.—Ed.]

The unsuccessful party to a suit is primarily liable for the costs, and the successful party has no interest in and no right to collect any portion of such costs, except such as have been advanced by him. *Hidy v. Hanson*, 89 N. W., 36.

**SEC. 1300. Fees payable by state or county.**

[For earlier annotations, see code, page 451.—Ed.]

Where, by providing a salary for police judge and marshal the city becomes entitled to their fees in criminal cases, it may recover such fees in an action against the county. *Des Moines v. Polk County*, 107-525.

# TITLE VII.

## OF THE REVENUE.

### CHAPTER 1.

#### OF THE ASSESSMENT OF TAXES.

#### SECTION 1303. Levy—amount of.

[For earlier annotations, see code, pages 452-3.—Ed.]

There can be no taxation except as authorized by statute or constitutional provision, and the taxing power can be exercised only in accordance with the forms of law. *Chicago, M. & St. P. R. Co., v. Phillips*, 111-377.

Provisions for levying a mulct tax on sellers of intoxicating liquor at the September session of the board of supervisors, held directory only and that a levy in December was valid. *Hubbell v. Polk County*, 106-613.

**SEC. 1304. Exemptions.** The following classes of property are not to be taxed:

1. The property of the United States and this state, including university, agricultural college and school lands, and all property leased to the state; the property of a county, township, city, town or school district or militia company, when devoted entirely to public use and not held for pecuniary profit; public grounds, including all places for the burial of the dead, crematoriums, the land on which they are built and appurtenant thereto not exceeding one acre, so long as no dividends or profits are derived therefrom; fire engines and all implements for extinguishing fires, with the grounds used exclusively for their buildings and meetings of the fire companies;

2. All grounds and buildings used for public libraries, including libraries owned and kept up by private individuals, associations or corporations for public use and not for private profit, and for literary, scientific, charitable, benevolent, agricultural and religious institutions, and societies devoted solely to the appropriate objects of these institutions, not exceeding one hundred and sixty acres in extent, and not leased or otherwise used with a view to pecuniary profit, but all deeds or leases by which such property is held shall be filed for record before the property above described shall be omitted from the assessment; the books, papers and apparatus belonging to the above institutions, used solely for the purposes above contemplated, and the like property of students in any such institution used for their education; moneys and credits belonging exclusively to such institutions, and devoted solely to sustaining them, but not exceeding in amount or income the amount prescribed by their charters or articles of incorporation;

3. The farm produce of the person assessed, harvested by him, and all wool shorn from his sheep, within one year previous to the listing; all poultry, ten stands of bees, all swine and sheep under six months of age; and all other domestic animals under one year of age not hereinbefore exempt; obligations for rent not yet due, in the hands of original payees, private libraries, professional libraries to the actual value of three hundred dollars; family pictures; household furniture to the actual value of three hundred dollars and kitchen furniture; beds and bedding requisite for each family; all wearing apparel in actual use; and all food provided for the family; but the exemptions allowed in this subdivision shall not be held to apply to hotels and boarding houses except so far as said exempted classes of property shall be for the actual use of the family managing the same;

4. The polls or estates, or both, of persons who by reason of age or infirmity may in the opinion of the assessor be unable to contribute to the public revenue, such opinion and the fact on which it is based being in all cases entered on the assessment roll, and subject to reversal by the board of review;

5. The farming utensils of any person who makes his livelihood by farming, the team, wagon and harness of the teamster or drayman who makes his living by their use in hauling for others, and the tools of any mechanic, not in any case to exceed three hundred dollars in actual value;

6. Government lands entered and located, or lands purchased from this state, for the year in which the entry, location or purchase is made;

7. The property not to exceed eight hundred dollars in actual value, of any honorably discharged union soldier or sailor of the Mexican war or of the war of the Rebellion or of the widow remaining unmarried of such soldier or sailor. It shall be the duty of every assessor annually to make a list of all such soldiers, sailors and widows, and to return such list to the county auditor, upon forms to be furnished by such auditor for that purpose; but the failure on the part of any assessor so to do shall not affect the validity of any exemption. All soldiers, sailors or widows thereof referred to herein shall receive a reduction of eight hundred dollars at the time said assessment is made by the assessor unless waiver thereof is voluntarily made of said exemption at said time; but this exemption shall not apply in the case of any soldier or sailor or the widow of such soldier or sailor, owning property of the actual value of five thousand dollars (\$5,000.00) or where the wife of such soldier or sailor owns property to the actual value of five thousand dollars (\$5,000.00). [26 G. A., ch. 29; 21 G. A., ch. 97; C. '73, § 797; R., § 711; C. '51, § 455.] [29 G. A., ch. 56, § 1.]

[For earlier annotations, see code, pages 454-7.—Ed.]

A general exemption from taxation, not embodied in a contract, is not irrevocable, even though property has been acquired or expenses incurred in reliance thereon. *Miller v. Hageman*, 114-195.

The fact that the property of a county is exempt from general taxation does not exempt it from liability for a special assessment for street improvements in a city. *Edwards & Walsh Const. Co. v. Jasper County*, 90 N. W., 1006.

Land which is part of the public domain at the time of assessment is not subject to taxation. *Davis v. Magoun*, 109-308.

But where a homestead entry was canceled only because in supposed conflict with a railway grant, and was subsequently established, held that such cancellation did not prevent the land from being taxable to the claimant. *Ibid.*

Land which has been acquired by condemnation by a school district for a school-

house site cannot be sold at tax sale for taxes already due thereon at the time of condemnation. *Independent School Dist. v. Hewitt*, 105-663.

While it is true that when the full equitable title to public land has passed from the government, even prior to the issue of a patent conveying the legal title, the land is subject to taxation; yet until such equitable title has passed and while the land is still subject to the control of the government, it is beyond the reach of the state's power to tax. *Hussman v. Durham*, 165 U. S., 144.

To be entitled to an exemption as a charitable, benevolent or religious institution it must appear that the body is such institution, and that the property is devoted solely to the appropriate objects of such institution. The presumption is in favor of taxation and against exemption. *Lacy v. Davis*, 112-106.

**SEC. 1304-a. What property exempt.** That the following named property is exempt from taxation until January 1st, 1910, viz: All mills, buildings, machinery, tools, apparatus and appliances for the manufacture of sugar, the land upon which said mill is situated not to exceed ten acres, the capital invested in the business of the manufacture of sugar from beets raised in the state of Iowa, all personal property used in connection with said business, also the stock, shares, and certificates of any company or corporation actually engaged in said business. [28 G. A., ch. 40, § 1.]

**SEC. 1305. Valuation.** All property subject to taxation shall be valued at its actual value, which shall be entered opposite each item, and shall be

assessed at twenty-five per cent. of such actual value. Such assessed value shall be taken and considered as the taxable value of such property, upon which the levy shall be made. Actual value of property as used in this chapter shall mean its value in the market in the ordinary course of trade. [Code '97.] [27 G. A., ch. 30, § 1.]

**SEC. 1306-a. Repeal.** That section thirteen hundred and six (1306) of the code be and is hereby repealed, and the following enacted in lieu thereof: [28 G. A., ch. 41, § 1.]

**SEC. 1306-b. Amount of indebtedness limited.** No county or other political or municipal corporation, including cities acting under special charters, shall be allowed to become indebted, in any manner or for any purpose, to an amount in the aggregate exceeding one and one-fourth per centum on the actual value of the property within such county or corporation, to be ascertained by the last state and county tax list previous to the incurring of such indebtedness. [28 G. A., ch. 41, § 2.]

### SEC. 1308. What taxable—lands of other counties.

[For earlier annotations, see code, pages 458-9.—Ed.]

Animals held with a view of traffic therein, as in merchandise, are assessable under the provisions of Code § 1318, providing for the taxation of merchants; otherwise, although bought with the intention of owning them for a limited time only, they should be taxed to the owner as other personal property. *Jewell v. Board of Trustees*, 113-47.

Money in the hands of an executor or

administrator is not exempt from taxation simply for the reason it is not being loaned or invested, and even though the administration is ancillary, the money and property of the estate located in this state is subject to taxation, unless at least, taxes thereon have been paid in the state of principal administration. *Dorris v. Miller*, 105-564.

### SEC. 1311. Deducting debts.

[For earlier annotations, see code, page 461.—Ed.]

The valuation of corporate stock cannot be offset by indebtedness. *In re Kauffman's Est.*, 104-639.

### SEC. 1312. Listing—by whom.

[For earlier annotations, see code, page 462.—Ed.]

The administrator of a non-resident should list for taxation in this state funds which have been sent into the state and placed in the hands of an agent for investment, as contemplated by Code § 1320. *In re Miller's Est.*, 90 N. W., 89.

The fact that local or ancillary administration was delayed by the acts of the agent will not be taken into consideration in determining whether the funds remained subject to taxation. *Ibid.*

### SEC. 1317. Business in different states—partners.

[For earlier annotations, see code, page 468.—Ed.]

Notes taken by a branch bank in the ordinary course of business, and held as a part of its assets are taxable in the district where such bank is located. *Farmers' Loan & Trust Co. v. Fonda*, 114-728.

Transfer of such notes to another branch of the same parent institution, and giving credit to the branch from which they are taken for the amount thereof, will not affect the question of taxation. *Ibid.*

### SEC. 1318. Merchants.

[For earlier annotations, see code, page 464.—Ed.]

One who purchases stock with a view of fattening and reselling is not a merchant, and should be assessed on the stock owned

by him on the first of January. *Jewell v. Board of Trustees*, 113-47.

### SEC. 1320. Agent personally liable.

[For earlier annotations, see code, page 465.—Ed.]

Where funds are sent into this state and placed in the hands of an agent for

investment so as to subject them to taxation, the death of the principal does not

terminate the right to impose such tax. Such funds continue subject to taxation until removed from the state under the process of administration. *In re Miller's Est.*, 90 N. W., 89.

**SEC. 1321. Private bankers.** Private banks or bankers, or any persons other than corporations hereinafter specified, a part of whose business is the receiving of deposits subject to check, on certificates, receipts, or otherwise, or the selling of exchange, shall prepare and furnish to the assessor a sworn statement, showing the assets, aside from real estate, and liabilities of such bank or banker on January first of the current year, as follows:

1. The amount of moneys, specifying separately the amount of moneys on hand or in transit, the funds in the hands of other banks, bankers, brokers or other persons or corporations, and the amount of checks or other cash items not included in either of the preceding items;

2. The actual value of credits, consisting of bills receivable owned by them, and other credits due or to become due;

3. The amount of all deposits made with them by others, and also the amount of bills payable;

4. The actual value of bonds and stocks of every kind and shares of capital stock or joint stock of other corporations or companies held as an investment, or in any way representing assets, and the specific kinds and description thereof exempt from taxation;

5. All other property pertaining to said business, including real estate, which shall be specially listed and valued by the usual description thereof;

The aggregate actual value of moneys and credits, after deducting therefrom the amount of deposits and of debts owing by such bank as provided in this chapter, and the aggregate actual value of bonds and stocks, after deducting the portion thereof exempt, or otherwise taxed in this state, and also the other property pertaining to the business, shall be assessed as provided by section thirteen hundred and five (1305) of this chapter, not including real estate, which shall be listed and assessed as other real estate. [15 G. A., ch. 63; C. '73, § 812; R., §§ 719, 720; C. '51, §§ 460, 465.] [27 G. A., ch. 30, § 2.]

[For earlier annotations, see code, page 465.—Ed.]

Where a branch bank had just prior to the first day of January as a part of its assets notes taken in the usual course of business, and the parent bank then transferred such notes to another branch, giving credit to the first branch therefor on the books of the parent institution, held that such transfer did not relieve the branch from which the notes had been transferred of liability for assessment thereon. *Farmers' Loan & Trust Co. v. Fonda*, 114-728.

**SEC. 1322. National state and savings banks.**

[For earlier annotations, see code, page 466.—Ed.]

Where by mutual agreement stockholders deposit a fund which becomes a part of the capital of the bank it should be taxed by taxing the shares of stock, and not as the individual deposit of the stockholders. *State Exchange Bank v. Parkersburg*, 112-104.

**SEC. 1330. Assessment by executive council.** The executive council shall, at its meeting on the second Monday in July in each year, proceed to find the actual value of the property of such companies in this state, taking into consideration the information obtained from the statements above required, and any further information they can obtain, using the same as a means for determining the actual cash value of the property of such companies within this state; also taking into consideration the valuation of all property of such companies, including franchises and the use of the property in connection with lines outside the state, and making such deductions as may be necessary on account of extra value of property outside the state as compared with the value of property in the state, in order that the actual cash value of the property of the company within this state may be ascer-

tained. Said assessment shall include all property of every kind and character whatsoever, real, personal, or mixed, used by said companies in the transaction of telegraph and telephone business; and the property so included in said assessment shall not be taxed in any other manner than as provided in this act. [C. '97.] [28 G. A., ch. 42, § 1.]

**SEC. 1330-a. Actual value per mile—taxable value.** The executive council shall ascertain the value per mile of the property of each of said companies within this state by dividing the total value, as above ascertained, by the number of miles of line of such company within the state, and the result shall be deemed and held to be the actual value per mile of line of the property of such company within this state. The taxable value shall be determined by taking the percentage of the actual value so ascertained, as provided by section one thousand three hundred and five (1305) of the code, and the ratio between the actual value and the assessed or taxable value of the property of each of said companies shall be the same as in the case of property of private individuals. At such meeting in July any company interested shall have the right to appear, by its officers or agents, before the executive council and be heard on the question of the valuation of its property for taxation. [28 G. A., ch. 42, § 2.]

**SEC. 1330-b. Assessment in each county—how certified.** The executive council shall, for the purpose of determining what amount shall be assessed to any one of said companies in each county of the state into which the line of the said company extends, multiply the assessed or taxable value per mile of line of said company, as above ascertained, by the number of miles in each of said counties, and the result thereof shall be by said council certified to the auditor of state, who shall thereupon certify the same to the auditors respectively of the several counties into which, or over which, the lines of said companies extend, together with a statement of the length of such lines in each township and assessment district in each county. [28 G. A., ch. 42, § 3.]

**SEC. 1330-c. Levy and collection of tax.** At the first meeting of the board of supervisors held after such statement is received by the county auditor it shall cause such statement to be entered in its minute book, and make and enter therein an order stating the length of the lines and the assessed value of the property of each of said companies situated in each city, town, township, or lesser taxing district in its county, as fixed by the executive council, which shall constitute the taxable value of said property for taxing purposes, and the taxes on said property when collected by the county treasurer shall be disposed of as other taxes on real estate. The county auditor shall transmit a copy of said order to the council or trustees of each city, town, or township in which the lines of said company extend. [28 G. A., ch. 42, § 4.]

**SEC. 1330-d. Rates and purposes.** All telegraph and telephone property shall be taxable upon said assessment at the same rates, by the same officers, and for the same purposes as the property of individuals within such counties, cities, towns, townships, or lesser taxing districts, and the county treasurer shall collect such taxes at the same time and in the same manner as other taxes, and the same penalties for the nonpayment shall be due and collectible as for the nonpayment of individual taxes. [28 G. A., ch. 42, § 5.]

**SEC. 1330-e. Other real and personal property.** Land, lots, and other real estate and personal property belonging to any telegraph company or telephone company not used exclusively in its telegraph or telephone business shall be subject to assessment and taxation on the same basis as other property of individuals in the several counties where situated. [28 G. A., ch. 42, § 6.]

**SEC. 1330-f. "Company" defined.** The word "company" as used in this act shall be deemed and construed to mean and include any person,

co-partnership, association, corporation, or syndicate that shall own or operate, or be engaged in operating, any telegraph or telephone line whether formed or organized under the laws of this state or elsewhere. [28 G. A., ch. 42, § 7.]

**SEC. 1330-g. Owners of capital stock exempt.** The owner of the capital stock in any telegraph or telephone company operating any line or lines in this state shall not be assessed for taxation upon said capital stock. [28 G. A., ch. 42, § 8.]

**SEC. 1330-h. Power to reassess and relevy taxes.** When by reason of non-conformity to any law, or by any omission, informality, or irregularity, or for any other cause, any tax heretofore or hereafter levied and assessed against any person, company, association, or corporation by the executive council is invalid or is adjudged illegal, the executive council may assess and levy a tax against such person, company, association, or corporation for the year or years for which such tax is invalid or illegal, or when necessary may assess and certify the same to the proper county officers, who shall levy such tax as by law in such cases made and provided, with the same force and effect as though done at the proper time and under any valid law, whether in force at the time of said levy and assessment or thereafter enacted. [28 G. A., ch. 49, § 1.]

**SEC. 1330-i. Voluntary payments.** When any person, company, association, or corporation, against whom any tax has been assessed and levied by the executive council and held invalid or illegal, shall have paid the same voluntarily or shall otherwise waive such invalidity and illegality, the executive council shall accept such tax in lieu of the tax to be raised by the reassessment and relevy provided for in section one hereof. [28 G. A., ch. 49, § 2.]

**SEC. 1331-a. Repeal.** Section one thousand three hundred and thirty-one (1331) of the code, and all laws and parts of laws in conflict herewith are hereby repealed. [28 G. A., ch. 42, § 9.]

**SEC. 1333. Insurance companies.** Every insurance company or association organized or incorporated under the laws of any state or nation other than the United States, and every other insurance company whose charter may be owned or a majority of whose stock may be controlled or whose business shall be carried on in the interest or for the benefit of any insurance company or association incorporated under the laws of any state or nation other than the United States, shall, at the time of making the annual statements as required by law, pay into the state treasury as taxes two and one-half per cent. of the gross amount of premiums received by it for business done in this state, including all insurance upon property situated in this state and upon the lives of persons resident in this state during the preceding year. Every insurance company incorporated under the laws of any state of the United States other than the state of Iowa, not including associations operating under the provisions of chapter seven, title nine of this code, or fraternal beneficiary associations doing business in the United States, shall, at the time of making the annual statements as required by law, pay into the state treasury as taxes two and one-half per cent. of the gross amount of premiums received by it for business done in this state, including all insurance upon property situated in this state and upon the lives of persons resident in this state during the preceding year. At the time of paying said taxes, said companies and associations shall take duplicate receipts therefor, one of which shall be filed with the auditor of state, and upon filing of said receipt, and not till then, the auditor shall issue the annual certificate as provided by law. No deduction or exemption from the taxes herein provided shall be allowed for or on account of any indebtedness owing by any such insurance company or association. [C. '73, § 807; R., § 718; C. '51, § 464.] [28 G. A., ch. 43, § 1.] [29 G. A., ch. 57, § 1.]

This section, which requires insurance companies to pay a tax on gross earnings within the state, and exempts them from payment of all other taxes, state or local, except taxes on real property and special assessments is unconstitutional under Constitution, Art. 8, § 2, which subjects property of all corporations for pecuniary profit to taxation the same as that of individuals. *Hawkeye Ins. Co. v. French*, 109-585.

The tax here provided for is not unconstitutional on account of lack of uniformity. There is no requirement that taxes on

business or on privileges shall be uniform. *Scottish U. & N. Ins. Co. v. Herriott*, 109-606.

The officers of the state are not authorized to collect this tax by suit or distraint of property. The only effect of the non-payment is that the auditor will not issue a certificate authorizing the delinquent company to do business in the state during the ensuing year. *Manchester Ins. Co. v. Herriott*, 91 Fed., 711.

This section is unconstitutional on account of lack of uniformity. *Ibid.*

**SEC. 1333-a. Domestic companies.** The shares of stock of every insurance corporation or association having capital stock, organized under the laws of this state, shall be assessed for taxation in the manner provided for the assessment of the shares of corporate stock in sections thirteen hundred and twenty-three (1323), thirteen hundred and twenty-four (1324) and thirteen hundred and twenty-five (1325) of the code, and as in this act provided, and said shares of stock shall not be otherwise assessed. In addition to the statement required in section thirteen hundred and twenty-three (1323) of the code, the corporation shall furnish to the assessor a copy of its annual report made to the auditor of state. [28 G. A., ch. 43, § 2.]

**SEC. 1333-b. Statement furnished local assessor—what to contain—duty of assessor.** Every insurance corporation or association organized under the laws of this state, not including corporations with capital stock, county mutuals, and fraternal beneficiary associations, which county mutuals and fraternal beneficiary associations are not organized for pecuniary profit, shall on or before the 26th day of January in each year, for the purpose of assessment of its property, furnish to the assessor of the assessment district in which its principal place of business is located, a statement verified by its president, showing specifically with reference to the year next preceding the first day of January, then last past: (1), a duplicate of the statement required by law to be made to the auditor of state for the said year last past; (2), a detailed statement of all its property and assets of every kind and nature whatsoever, and the value of each item thereof, including surplus, guaranty and reserve fund, and the amount of each. It shall be the duty of the assessor, upon the receipt of said statements, and from other information acquired by him, to assess against every corporation or association referred to in this section, the value of all personal property owned by such corporation or association, together with the actual value of each parcel of real estate situated in the assessment district of such assessor, and all the said property shall be assessed at the same rate, and for the same purposes as the property of private individuals, as provided in section thirteen hundred and five (1305) of the code. [28 G. A., ch. 43, § 3.]

**SEC. 1333-c. Assessment of moneys and credits.** In assessing for taxation the moneys and credits of every insurance corporation, company or association, organized under the laws of this state, except county mutuals and fraternal beneficiary associations, which county mutuals and fraternal beneficiary associations are not organized for pecuniary profit, the assessor shall ascertain the debts or liabilities, if any, of such corporation, company or association to its shareholders or other persons, which debts and liabilities shall be deducted, as provided in section thirteen hundred and eleven (1311) of the code, but in ascertaining the indebtedness or liability of such corporation, company or association, a debt shall be deemed to exist on account of its liability on the policies, certificates or other contracts of insurance issued by it equal to the amount of the surplus or other funds accumulated by any such corporation, or association, pursuant to law, its contracts of insurance

or its articles of incorporation for the purpose of fulfilling its policies, certificates or other contracts of insurance, and which can be used for no other purpose. [28 G. A., ch. 43, § 4.]

**SEC. 1333-d. State tax—date payable.** Every insurance corporation or association of whatever kind or character, organized under the laws of the state of Iowa, not including county mutuals or fraternal beneficiary associations, which county mutuals and fraternal beneficiary associations are not organized for pecuniary profit, shall, on or before the first day of March of each year, pay to the treasurer of state a sum equivalent to one per centum of the gross receipts from premiums, assessments, fees and promissory obligations required by insurance contracts which are received during the next year preceding the first day of January last past, after deducting the amounts actually paid for losses, matured endowments, dividends to policy holders and the increase in the amount of the reserve as certified by the department actuary in his official statement to the auditor of state on the 31st day of December previous, based on the actuaries' table of mortality and four per cent., and the amounts returned to members upon canceled policies, certificates and rejected applications, during said year, and not until such payment shall the auditor of state issue the annual certificate, as provided by law. [28 G. A., ch. 43, § 5.]

**SEC. 1333-e. Supervisors to correct assessments—when and how.** In the event that any insurance corporation or association, affected by this act, shall pay to the treasurer of state prior to May first, 1900, a sum so that the amount of its payment to said treasurer of state for the year 1900 shall equal what said corporation or association would be compelled to pay to said treasurer of state had this act been in force prior to the granting of the annual certificate by the auditor of state for the year 1900, then such corporation or association shall, for the levy made in the year 1900, be subject to the provisions of this act, respecting the levy and assessment of taxes by local and municipal authorities, and upon presentation of the receipt from the said treasurer of state showing a compliance with this section by such insurance corporation or association, it is hereby made the duty of the board of supervisors of the proper county to alter and correct the assessment of such corporation, association or shareholder made in the year 1900, so that said assessment shall be the same in amount as though it had been made under the provisions of this act, and the tax levied by the local or municipal authorities against every such corporation or association or its shareholders entitled to the benefit of this section, is corrected accordingly. Any corporation or association entitled to, but failing to take advantage of, the provisions of this section, shall not be relieved from any local or municipal tax heretofore levied by any of the provisions of this act. [28 G. A., ch. 43, § 6.]

**SEC. 1334. Railway companies—when made—verified statement—when furnished.** On the second Monday in July in each year, the executive council shall assess all the property of each railway corporation in the state, excepting the lands, lots and other real estate belonging thereto not used in the operation of any railway, and excepting railway bridges across the Mississippi and Missouri rivers, and excepting grain elevators; and for the purpose of making such assessment its president, vice-president, general manager, general superintendent, receiver or such other officer as the council may designate, shall, on or before the first day of April in each year, furnish it a verified statement, showing in detail, for the year ended December thirty-first next preceding:

1. The whole number of miles of railway owned, operated or leased by such corporation or company within and without the state;
2. The whole number of miles of railway owned, operated or leased within the state, including double tracks and side tracks, the mileage of the main line and branch lines to be stated separately, and showing the number of miles of track in each county;

3. A detailed statement, showing the amount of real estate owned or used by said railway in the operation thereof in each county within the state, including the right of way, roadbeds, bridges, culverts, depot grounds, station-houses, yards, section and tool houses, roundhouses, machine and repair shops, water tanks, turntables, gravel beds and stone quarries, and for all other purposes, and the estimated value thereof, in such manner as may be required by the council;

4. A full and complete statement of the cost and actual present value of all buildings of every description owned by said railway company within the state not otherwise assessed;

5. The total number of ties per mile used on all its tracks within the state;

6. The weight of rails per yard in main line, double tracks and side tracks;

7. The number of miles of telegraph lines owned and used within the state;

8. The total number of engines, and passenger, chair, dining, official, express, mail, baggage, freight and other cars, including hand cars and boarding cars used in constructing and repairing such railway, in use on its whole line, and the sleeping cars owned by it, and the number of each class on its line within the state, each class to be valued separately;

9. Any and all other movable property owned by said railway within the state, classified and scheduled in such manner as may be required by said council;

10. The gross earnings of the entire road, and the gross earnings in this state;

11. The operating expenses of the entire road, and the operating expenses within this state;

12. The net earnings of the entire road, and the net earnings within this state. [C. '73, §§ 810, 1317, 1318.] [29 G. A., ch. 58, § 1.]

[For earlier annotations, see code, pages 471-2.—Ed ]

A street railway, although engaged to some extent in transporting goods and express matter for hire is not subject to assessment under the provisions of this section. So held as to a street railway

which had been extended along the public highway beyond the city limits to a neighboring town. *Cedar Rapids & M. C. R. Co. v. Cedar Rapids*, 106-476.

### SEC. 1336. Valuation.

The tax here provided for is on real and personal property without discrimination, and therefore a sewer district tax which can only be enforced against real property within the sewer district is not

enforcible against the real property of a railroad company which is included in its general assessment for taxation. *Chicago, M. & St. P. R. Co. v. Phillips*, 111-377.

**SEC. 1337. Statement sent county auditors.** On or before the first Monday in August of each year, the council shall transmit to the county auditor of each county, through and into which any railway may extend, a statement showing the length of the main track within the county, and the assessed value per mile of the same, as fixed by a ratable distribution per mile of the assessed valuation of the whole property. [16 G. A., ch. 153; C. '73, § 1320.] [29 G. A., ch. 58, § 2.]

**SEC. 1337-a. Plats—when filed.** That every railroad company owning or operating a line of railroad within this state, shall on or before the first day of August A. D. 1902, place on file in the office of the county auditor of each county in the state, into which any part of the lines of any said company lies, a plat of the lines of said companies within said county, showing the length of their said lines and the area of the land owned or occupied, by said companies in each government sub-division of land, not included within the platted portion of any town or city, within each of said counties, and the length of the said lines within the platted portion of cities and towns. Companies having on file such plats of part or all of their lines, in any of said counties, shall be required to file

plats only of that part of their lines not fully shown as above required on the plats now on file. On the first day of January of each year hereafter, like plats shall be filed of all new lines or extensions of existing lines built or completed within the calendar year preceding. [29 G. A., ch. 60, § 1.]

**SEC. 1337-b. Refusal to file.** In the event of the failure or refusal of any railroad company to file the plats required under the provisions of section one of this act, at the time or according to the conditions named, then the county auditor may cause the same to be prepared by the county surveyor and the cost thereof shall, in the first place, be audited and paid by the board of supervisors out of the county fund, and the amount thereof shall be by said board levied as a special tax against said company and the property of said company which shall be collected as county taxes and when collected be paid into the county fund. [29 G. A., ch. 60, § 2.]

**SEC. 1340. Number of sleeping and dining cars.** In addition to the matters required to be contained in the statement made by the company for the purposes of taxation, such statement shall show the number of sleeping and dining cars not owned by such corporation, but used by it in operating its railway in this state during each month of the year for which the return is made, the value of each car so used, and also the number of miles each month said cars have been run or operated on such railway within the state, and the total number of miles said cars have been run or operated each month within and without the state. Such statement shall show the average daily sleeping car and dining car service or wheelage operated on each part or division of the line or system within the state, designating the points on the line where variations occur, with the mileage of that part having the same daily service or wheelage. [17 G. A., ch. 114, § 1.] [28 G. A., ch. 44, § 1.]

**SEC. 1340-a. Gross earnings—proportion.** That for the purpose of making reports to the executive council, the gross earnings of railway companies, owning or operating a line or lines of railway partly within this state, and partly within another state, or other states, or territory, or territories, upon their line or lines within this state, shall be ascertained and reported by said railway companies as follows, to wit: The aggregate of the earnings upon business originating and terminating within this state, upon business originating in this state and terminating elsewhere, upon business originating elsewhere and terminating in this state, and upon business neither originating or terminating in this state but carried on or done over the line or lines in this state or over some part thereof, shall be reported; and with respect to all such interstate business the earnings in this state for the purpose of report shall be actually computed upon the basis of the length of haul or carriage in this state as compared with the length of haul or carriage elsewhere. It being hereby declared that for the purpose of making reports looking to the assessment of railway property for taxation the gross earnings or business done or carried partly within this state and partly in another state, or other states, or territory, or territories, shall be that proportion of the entire earnings of such business that the haul or carriage in this state bears to the entire haul or carriage. [29 G. A., ch. 61, § 1.]

**SEC. 1340-b. Rules and regulations—power of executive council.** The executive council shall have the power to prescribe such rules and regulations with respect to the keeping of accounts by the railway companies doing business in this state as will insure the accurate division of earnings as aforesaid, and uniformity in reporting the same to the executive council. [29 G. A., ch. 61, § 2.]

**SEC. 1340-c. Net earnings.** The executive council shall have the power to prescribe a method for all railway companies doing business in this state, together with rules and regulations for the ascertainment of the net earnings of the railway lines in this state, to the end that all such railway

companies, in ascertaining and making report of net earnings, shall proceed upon the same basis and in a uniform manner. [29 G. A., ch. 61, § 3.]

**SEC. 1340-d. Reports—when made.** The reports herein provided for are not in lieu of, but in addition to, the reports provided for by law, and they shall be made at the time and as a part of the reports already required. [29 G. A., ch. 61, § 4.]

**SEC. 1340-e. Additional rules and regulations.** The rules, regulations, method, and requirements herein provided to be made by the executive council shall be made and communicated in writing or print to the said several railway companies within thirty days from and after the passage and taking effect of this act, and shall be and become binding upon said railway companies from the time they are so communicated; provided, however, that the said executive council shall have the power to prescribe supplemental or additional rules, regulations, and requirements at any time, and communicate them to the several railway companies in the manner aforesaid, and with respect to such additional or supplemental rules, regulations, and requirements, they shall be and become binding upon the said railway companies within thirty days after they are so communicated. [29 G. A., ch. 61, § 5.]

**SEC. 1340-f. Refusal to conform to rules—penalty.** If any railway company shall fail or refuse to obey or conform to the rules, regulations, method, and requirements so made or prescribed by the executive council under the provisions of this act, or to make the reports as herein provided for, the executive council shall proceed and assess the property of such railway company so failing or refusing, according to the best information obtainable, and shall then add to the taxable valuation of such railway company twenty-five per centum thereof, which valuation and penalty shall be separately shown, and together shall constitute the assessment for that year. [29 G. A., ch. 61, § 6.]

**SEC. 1341. Assessment by executive council.**

[For re-assessment by executive council, see herein §§ 1330-h and 1330-i.—Ed.]

[For annotations, see code, page 473.—Ed.]

**SEC. 1342. Real property of railways.**

[For earlier annotations, see code, page 473.—Ed.]

In determining whether real property claimed by a railroad company is included in its property as assessed by the executive council and is therefore exempt from taxation in any other form, the return of the railroad company to the executive council is not conclusive, and the council may reject property so returned as not coming within the statutory provisions as to such taxation; therefore to defeat the collection of taxes levied on lots claimed by the railroad company on assessments made by local authorities, not simply the return of the railroad company of such property to the executive council, but the

inclusion of such property in the assessment of the railroad by the executive council must be shown. *Chicago, B. & Q. R. Co. v. Kelley*, 105-106.

A railroad company is not taxable under this section for the value of elevators owned by it and situated on its right of way, though leased by tenants for a nominal rent, if exclusively used in storing or taking in grain for shipment over the road; otherwise if the elevators are used by the tenants for general purposes of storage for hire. *Herter v. Chicago, M. & St. P. R. Co.*, 114-330.

**SEC. 1342-a. Freight line and equipment companies.** Every company engaged in the business of operating cars, not otherwise listed for taxation or taxed in Iowa, for the transportation of freight, whether such freight be owned by such company, or any other person or company, over any railway line or lines, in whole or in part within this state, such line or lines, not being owned, leased or operated by such company, whether such cars be termed box, flat, coal, ore, tank, stock, gondola, furniture or refrigerator cars, or by some other name, shall be deemed to be a freight line com-

pany. Every company engaged in the business of furnishing or leasing cars of whatsoever kind or description, to be used in the operation of any railway line or lines, wholly or partially within this state, such line or lines not being owned, leased or operated by such company, and such cars not being otherwise listed for taxation in Iowa shall be deemed to be an equipment company. [29 G. A., ch. 62, § 1.]

**SEC. 1342-b. Verified statement—what to include.** Every freight line and every equipment company, as designated in the preceding section, doing business, or owning cars which are operated in this state, shall, annually, on or before the first Monday of June, in each year, commencing with the year 1903, make out and deliver to the executive council a statement, verified by oath of an officer or agent of such company making such statement, with reference to the first day of January, next preceding showing:

*First.*—The name of the company.

*Second.*—The nature of the company, whether a person or persons, an association, copartnership, corporation or syndicate, and under the laws of what state or county organized.

*Third.*—The location of its principal office or place of business.

*Fourth.*—The name and postoffice address of the president, secretary, auditor, treasurer and superintendent or general manager.

*Fifth.*—The name and postoffice address, of the chief officer or managing agent of the company in Iowa.

*Sixth.*—The aggregate number of miles traveled by its cars during the preceding calendar year while said cars were used in transporting freight either between two points in this state, or between a point within this state and a point without this state; but not including the mileage in this state or elsewhere, of its cars, while the said cars are used in transporting freight not consigned either to or from some point within this state.

*Seventh.*—The number of cars necessary for the mileage so to be reported under the circumstances that ordinarily attend the use of such cars and where different classes of cars are used by one such company as to the matters embraced in this and the preceding paragraph it shall furnish the required information as to each class of such cars.

*Eighth.*—The actual cash value on the first day of January next preceding of the said number of cars necessary to provide for the mileage, to be reported as required by paragraph six of this section.

*Ninth.*—The real estate, personal property, structure, machinery, fixtures and appliances, owned by said company, subject to local taxation within the state, and the location and the actual value thereof in the county, township or district where the same is assessed for local taxation. [29 G. A., ch. 62, § 2.]

**SEC. 1342-c. Additional statements—refusal to furnish—penalty.** Upon the filing of such statements the executive council shall examine each of them, and if he [they] shall deem the same insufficient, or if they fail to fully set out the matters required to be reported, it shall require such officer or agent to make such other and further statements as to such matters as he [they] may deem proper. In case of the failure or refusal of any company to make and deliver to the executive council any statement or statements required by this act, such company shall forfeit and pay to the state of Iowa, one hundred dollars each day such report is delayed beyond the first Monday of June, to be sued and recovered in any proper form of action, in the name of the state of Iowa, and such penalty when collected shall be paid into the general fund of the state. [29 G. A., ch. 62, § 3.]

**SEC. 1342-d. Assessment by executive council.** Upon the meeting of the executive council on the second Monday of July in each year, it shall value and assess as the property of said company within this state, the cars

of the said company necessary, under the circumstances ordinarily attending the use of such cars, for the mileage to be reported under paragraph six of the preceding section of this act, after examining such statements and after ascertaining the actual value of said property of such company therefrom, and from such other information as it may have or obtain. For that purpose the executive council may require such company by its agents or officers, to appear before said council with such books, papers, or additional statements as the council may require, and may compel the attendance of witnesses in case said council shall deem it necessary to enable it to ascertain the actual value of such property. From the entire actual value of the property within the state so ascertained, there shall be deducted by the said council the actual value of all cars locally assessed, and one-fourth of the residue of such actual value so ascertained, shall be by the executive council assessed to said company. [29 G. A., ch. 62, § 4.]

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**SEC. 1342-e. Tax—when due.** The council shall also at said meeting determine the rate of tax to be levied and collected upon said assessments, which shall be equal, as nearly as may be, to the average rate of taxes, state, county, municipal and local, levied throughout the state during the previous year, which rate shall be ascertained from the records and files in the auditor's office, and said tax shall be in full of all taxes except on real estate, personal property locally assessed, and special assessments, and shall become due and payable at the state treasury on the first day of February following the levy thereof, and if not so paid, the state treasurer shall collect the same by distress and sale of any property belonging to such company in the state in the same manner as is required of county treasurers in like cases; and the order of the executive council in such cases shall be sufficient authority therefor. [29 G. A., ch. 62, § 6.]

**SEC. 1342-f. "Company defined."** The word "company" as used in this act, shall be deemed and construed to mean any person, copartnership, association, corporation or syndicate that may own or operate, or be engaged in operating, furnishing or leasing cars, as defined and described in section one of this act, whether formed or organized under the laws of this state, or any other state or territory, or any foreign country. [29 G. A., ch. 62, § 7.]

**SEC. 1342-g. Stockholders.** The individual stockholders or owners of interests of said companies shall not be required to list their shares or interests in such companies so long as the companies pay the taxes on their property as herein provided. [29 G. A., ch. 62, § 8.]

**SEC. 1344. Roadbeds and highways.**

This section relates to the raising of general revenues, and not to assessment of railway property for street improvements. *Chicago, R. I. & P. R. Co. v. Ottumwa*, 112-300.

**SEC. 1346-a. Express companies—annual statement—what to contain.** Every company engaged in conveying to, from, through, in, or across this state, or any part thereof, money, packages, gold, silver, plate, merchandise, or any other article, by express, under a contract, express or implied, with any railroad company, or the managers, lessees, agents, or receivers thereof, provided such company is not a railroad company, a freight line company, nor an equipment company, shall be deemed and held to be an express company within the meaning of this act, and every such express company shall on or before the first Monday in May, 1900, and annually thereafter between the first day of February and the first day of March, make out and deliver to the executive council a statement verified by the oath of an

\*[There is no section 5 in the enrolled bill and I have retained the numbering to these sections, given in the enrolled bill.—Ed ]

officer or agent of said company, making such statement, with reference to the first day of January next preceding, showing:

*First.*—The name of the company, and whether a corporation, partnership, or person, and under the laws of what state or country organized.

*Second.*—The principal place of business, and the location of its principal office and the name and postoffice address of its president, secretary, and superintendent or general manager and the name and postoffice address of its principal officers or managing agent in Iowa.

*Third.*—The total capital stock of said company; (a) authorized; (b) issued.

*Fourth.*—The number of shares of capital stock issued and outstanding, and the par face value of each share, and in case no shares of stock are issued in what manner the capital stock thereof is divided, and in what manner such holdings are evidenced.

*Fifth.*—The market value of said shares of stock on the first day of January next preceding, and if such shares have no market value then the actual value thereof; and in case no shares of stock have been issued state the market value, or the actual value, in case there is no market value of the capital thereof, and the manner in which the same is divided.

*Sixth.*—The real estate, buildings, machinery, fixtures, appliances, and personal property owned by said company and subject to local taxation within the state of Iowa, and the location and actual value thereof in the county, township, or district where the same is assessed for local taxation.

*Seventh.*—The specific real estate, together with the improvements thereon, and all bonds, mortgages, and other personal property owned by said company, situated outside of the state of Iowa, and used exclusively outside the conduct of the business, with a specific description of all bonds, mortgages, and other personal property, and the cash value thereof, the purposes for which the same are used, and where the same are kept or deposited, and each piece of real estate, where located, the purpose for which the same is used, and the actual value thereof, in the locality where situated.

*Eighth.*—All mortgages upon the whole or any part of its property, together with the dates and amounts thereof.

- Ninth.*—(a) The total length of lines or routes over which the company transports such merchandise, freight, or express.  
 (b) The total length of such lines or routes as are outside of the state of Iowa.  
 (c) The length of such lines or routes within each of the counties, townships, and assessment districts within the state of Iowa. [28 G. A., ch. 45, § 1.] [29 G. A., ch. 164, § 1.]

**SEC. 1346-b. Additional statement—delay—penalty.** That section two (2), chapter forty-five (45) acts of the twenty-eighth (28) general assembly be and the same is hereby repealed, and the following enacted in lieu thereof:

SEC. 2. “Upon the filing of such statements, the executive council shall examine each of them, and if it shall deem the same insufficient, or in case it shall deem that other information is requisite, it shall require such officer or agent to make such other and further statements as the executive council may call for. In the case of the failure or refusal of any company to make out and deliver to the executive council any statement or statements required by this act, such company shall forfeit and pay to the state of Iowa one hundred dollars for each day such report is delayed beyond the first Monday in March of that year, to be sued and recovered in any proper form of action in the name of the state of Iowa, on the relation of the executive council, and such penalty when collected shall be paid into the general fund of the state.” [29 G. A., ch. 164, § 2.]

**SEC. 1346-c. Assessment by executive council.** That section three (3), chapter forty-five (45), acts of the twenty-eighth (28) general assembly

be and the same is hereby repealed, and the following enacted in lieu thereof:

**SEC. 3.** The executive council shall meet on the second Monday in July in each year, and it shall thereupon value and assess the property of such company, in the manner hereinafter set forth, after examining such statements, and after ascertaining the actual value of the property of such company therefrom, and from such other information as it may have or obtain. For that purpose the executive council may require such company, by its agents or officers, to appear before said council with such books, papers, or statements as the council may require, or it may require additional statements to be made by such company, and may compel the attendance of witnesses, in case said council shall deem it necessary, to enable it to ascertain the actual value of such property; any such company interested may, upon written application, appear before the executive council at such meeting, and be heard in the matter of the valuation of the property of such company for taxation. [29 G. A., ch. 164, § 3.]

**SEC. 1346-d. Actual value—how ascertained.** The executive council shall first ascertain the actual value of the entire property owned by said company, from said statements or otherwise, for that purpose taking the aggregate market value of all shares of capital stock, in case said shares have a market value, and in case they have none taking the actual value thereof or of the capital of said company, in whatever manner the same is divided, in case no shares of capital stock have been issued; provided, however, that in case the whole or any portion of the property of said company, shall be encumbered by a mortgage or mortgages, such council shall ascertain the actual value of such property by adding to the market value or the aggregate shares of stock or to the value of the capital, in case there shall be no such shares, the aggregate amount of the market or cash value of such mortgage or mortgages, and the result shall be deemed and treated as the actual value of the property of such company. The executive council shall, for the purpose of ascertaining the actual value of the property within the state of Iowa, next ascertain, from such statements or otherwise, the actual value in localities where the same is situated, of the several pieces of real estate, and all bonds, mortgages, and other personal property situated without the state of Iowa, and used exclusively outside of the general business of such company, which said actual value shall be by the executive council deducted from the gross actual value of the property as above ascertained. The executive council shall next ascertain the actual value of the property of such company within the state of Iowa, and for that purpose may take into consideration the proportional value of the company's property without and within the state, and shall take, as a basis of the valuation of the company's property in this state, the proportion of the whole aggregate value of said company, as above ascertained after deducting the actual value of such real estate without the state, which the length of the routes within the state of Iowa bears to the whole length of the routes of such company, and such amount so ascertained shall be considered and taken to be the entire actual value of the property of said companies within the state of Iowa. From the entire actual value of the property within the state so ascertained, there shall be deducted by the said council the actual value of all the real estate, buildings, machinery, appliances, and personal property not used exclusively in the conduct of the business within the state that are subject to local taxation within the counties, townships, and other assessment districts as hereinbefore described in the sixth item of section one of this act. [28 G. A., ch. 45, § 4.]

**SEC. 1346-e. Actual value per mile—taxable value.** The executive council shall thereupon ascertain the value per mile of the property within the state, by dividing the total value as above ascertained, after deducting the specific properties locally assessed within the state, by the number of miles

within the state, and the result shall be deemed and held to be the actual value per mile of the property of such company within the state of Iowa. The assessed or taxable value shall be determined by taking that percentage of the actual value so ascertained, as is provided by section thirteen hundred and five of the code, and such valuation and assessment shall be in the same ratio as that of the property of individuals. [28 G. A., ch. 45, § 5.]

**SEC. 1346-f. Repeal—assessment in each county—how certified.** That section six (6), chapter forty-five (45), acts of the twenty-eighth (28) general assembly be and the same is hereby repealed and the following enacted in lieu thereof:

SEC. 6. Said executive council shall thereupon, for the purpose of determining what amount shall be assessed by it to said company, in each county of the state, through, across, into, or over which the route of said company extends, multiply the value per mile, as above ascertained, by the number of miles in each of said counties, as reported in said statements, or as otherwise ascertained, and the result thereof, with the mileage and the rate of assessment per mile, shall be by said council certified to the auditors respectively of the several counties through, into, over and across which the routes of said company extend. [29 G. A., ch. 164, § 4.]

**SEC. 1346-g. Repeal—levy and collection of tax—rates.** That section seven (7), chapter forty-five (45), acts of the twenty-eighth (28) general assembly be and the same is hereby repealed, and the following enacted in lieu thereof:

“Sec. 7. At the first meeting of the board of supervisors held after such certificate is received by the county auditor, it shall cause the same to be entered in its minute book and make and enter therein an order stating the length of the routes and the assessed value of each in each city, town, township, or other taxing district in its county, through or into which said routes extend, which shall constitute the taxable value of said property for taxing purposes, and the taxes on said property, when collected by the county treasurer, shall be disposed of as other taxes. The county auditor shall immediately thereafter transmit a copy of said order to the councils of cities, or towns, and to the trustees of each township, in the county. The county auditor shall also add to the value so apportioned the assessed value of the real estate, buildings, machinery, fixtures, appliances, and personal property not used exclusively in the conduct of the business situated in any township or taxing district as returned by the assessor thereof, and extend the taxes thereon upon the tax list as in other cases. All such property shall be taxable upon said assessment at the same rates, by the same officers, and for the same purposes as the property of individuals within such counties, townships, or taxing districts. The property so included in said assessment and the shares of stock in such companies so assessed shall not be taxed in this state, except as provided in this act.” [29 G. A., ch. 164, § 5.]

**SEC. 1346-h. Penalty.** In case any such company shall fail or refuse to pay any taxes assessed against it in any county, township, or assessment district in the state, in addition to other remedies provided by law for the collection of taxes, an action may be prosecuted in the name of the state of Iowa by the county attorneys of the different counties of the state, on the relation of the auditors of the different counties of the state, and judgment in such action shall include a penalty of fifty per cent. of the amount of the taxes so assessed and unpaid, together with reasonable attorney's fees for the prosecution of such action, which action may be prosecuted in any county into, through, over, or across which the routes of any such company shall extend, or in any county where such company shall have an officer or agent for the transaction of business. [28 G. A., ch. 45, § 8.]

**SEC. 1346-i. “Company” defined.** The word “company,” as used in this act, shall be deemed and construed to mean and include any person, co-

partnership, association, corporation, or syndicate that may own or operate, or be engaged in operating, any express route as herein defined, whether formed or organized under the laws of this state, any other state or territory, or of any foreign country. [28 G. A., ch. 45, § 9.]

**SEC. 1346-j. Acts in conflict repealed.** The provisions of this act are intended to take the place of sections thirteen hundred and forty-five, and thirteen hundred and forty-six of the code, and such sections and each of them, and all other laws and parts of laws in conflict with this act are hereby repealed; provided, that all moneys now due the state on account of any assessment or charge made against any of such persons, co-partnerships, associations, corporations, or syndicates, and all penalties and charges thereon growing out of any of said repealed section[s], shall be paid and collected under the provisions of said repealed sections, the same as if said sections were not repealed, and it is hereby expressly provided that all rights of the state now accrued under said sections are hereby saved from the operation of the aforesaid repealing clauses. [28 G. A., ch. 45, § 10.]

**SEC. 1347. Peddlers—amount of tax.**

This section is unconstitutional on account of the exception as to persons who have served in the Union army or navy. The classification attempted is based on no apparent necessity or difference in conditions or circumstances. *State v. Garbroski*, 111-496.

**SEC. 1347-a. Repeal—peddlers—rate of taxation determined.** That section thirteen hundred and forty-seven of the code be and the same is hereby repealed and the following enacted in lieu thereof:

Peddlers plying their vocation outside a city or town, shall pay an annual county tax of not less than one dollar nor more than fifty dollars as the board of supervisors of any county may provide for that county. Upon application the county auditor shall issue a license for three months upon the payment to him of one-fourth of said annual tax. But the board of supervisors of any county may remit the taxes where it is deemed that the articles to be sold are of an educational nature. Nothing in this section shall be held to apply to parties selling their own work or production either by themselves or employes, nor to persons selling at wholesale to merchants, nor to transient vendors of drugs. [27 G. A., ch. 32, § 1.]

**SEC. 1348. License.** Any person peddling outside the limits of a city or town without such license or after the expiration thereof, shall be guilty of a misdemeanor, whether he be the owner of the goods sold or carried by him or not, and, on conviction thereof, shall forfeit and pay into the county treasury, in addition to the penalty imposed therefor, double the amount of the tax for one year as fixed in the preceding section. The license shall be good only in the county in which issued, and shall not authorize peddling in cities and towns. [C. '73, § 907; R., § 792; C. '51, §§ 511, 512.] [28 G. A., ch. 46, § 1.]

**SEC. 1350. Personal property—real estate—buildings.**

[For earlier annotations, see code, page 476 —Ed ]

Assessments of personal property relate back to the first of January previous. *Peters v. Davenport*, 104-625; *in re Kauffman's Estate*, 104-639. the name of the owner of the personal property on the first of January, although at the time of the assessment the owner is deceased. *Peters v. Davenport*, 104-625.

Assessments may properly be made in

**SEC. 1352. Listing property—valuation.**

[For earlier annotations, see code, pages 477-8.—Ed ]

An assessment in the absence of evidence to the contrary will be presumed to have been properly made. *In re Kauffman's Est.*, 104-639.

**SEC. 1354. Duty of assessor—owner to assist.**

[For earlier annotations, see code, page 479.—Ed.]

Cattle brought into the state for feeding purposes, and kept in the state until after the first of January, are subject to taxation, although the owner is a non-resident. The case is different where the property is taken through the state merely in the course of transportation. *Fennell v. Pauley*, 112-94. Where, through clerical mistake, the amount of the valuation fixed by the assessor is erroneously entered on the list, the taxpayer is not precluded from questioning the amount of the assessment by failure to go before the board of equalization for relief. *Smith v. McQuiston*, 108-363.

**SEC. 1356. Notice of valuation.**

[For earlier annotations, see code, page 479.—Ed.]

The omission of the assessor to give written notice to the person assessed of the valuation placed upon his property will not render the assessment invalid. *In re Kauffman's Est.*, 104-639.

**SEC. 1357. Refusal to furnish statement.**

The penalty for failure to make return as required cannot be avoided by subsequently making a return after the assessor's books have been placed before the board of review. *Farmers' Loan & Trust Co. v. Fonda*, 114-728.

**SEC. 1360. Assessment rolls and books.** The auditor shall procure and furnish to each assessor a supply of blank assessment rolls, on which to enter, separately, the names of all persons, partnerships, corporations or associations assessed, which rolls shall be made in duplicate, except that the oath form in the original may be omitted and the following inserted in lieu thereof: "If you are not satisfied that the foregoing assessment is correct, you can appear before the board of review, which meets at... .. on the first Monday of April next. Dated..... day of..... 19..... Assessor." Said duplicate shall be signed by the assessor, detached from the original, and delivered to the person assessed. He shall also furnish to each assessor a supply of blanks in this chapter described as "Assessment Roll, Form No. 2," which shall be in duplicate, and subject to the same conditions as the roll above provided for. The auditor shall also furnish to the assessor two assessment books, each page of which shall be headed "Assessor's book for.....township,.....County, Iowa, independent district of .....,," and shall contain columns ruled and headed for the information required by this act, which rolls and books shall be substantially in the following form:

ASSESSMENT ROLL.

Name.....Age.....Address.....No. Dogs....male....female....

No. road district. Name or number of school district.	PART OF SECTI'N OR NAME OF TOWN.	Section or lot. Township or block. Range.	Value of new buildings. No. of acres improved. No. of acres unimproved.	TOTAL NUMBER OF ACRES TAXABLE		LANDS.		L'TS	EX-EMP. TIONS	No. of articles.	DESCRIPTION OF PERSONAL PROPERTY.	Actual value. Remarks.
				Acr's	100	Actual value per acre.	Actual value.					
											Colts 1 year old.....	
											Colts 2 years old.....	
											Colts 3 years old.....	
											Horses over 3 years old	
											Stallions.....	
											Mules and asses over 1	
											year old.....	
											Heifers 1 year old.....	
											Heifers 2 years old.....	
											Cows.....	
											Steers 1 year old.....	
											Steers 2 years old.....	
											Steers 3 years old or	
											over.....	
											Bulls.....	
											Work oxen.....	
											Sheep over 6 months	
											old.....	
											Swine over 6 months	
											old.....	
											Vehicles.....	
											Household furniture of	
											hotel and boarding-	
											house.....	\$.....
											Moneys and credits fr'm	
											form No. 2.....	\$.....
											Merchandise.....	\$.....
											Other personal prop-	
											erty.....	\$.....
											Total actual value per-	
											sonal.....	
											Total taxable value per-	
											sonal.....	
											Total actual value real	
											estate.....	
											Total net taxable value	
											real estate.....	
											Corporation stock.....	

Total number of acres - - - - -  
 Total actual value of real estate - - - - - \$ \$  
 Total taxable value of real estate - - - - - \$ \$ \$ \$  
 Total exemptions - - - - - \$ \$  
 Net total value of lands and lots - - - - - \$

Date of Inventory .....

Report name of soldier or sailor; or widow of soldier or sailor, and names of persons who by reason of age or infirmity claim to be unable to contribute to public revenue.

Notice of right to appear before board of review given. ....A. D....

Changes by board of review are as follows:

STATE OF IOWA, }  
 .....COUNTY. } ss.

I, ....., do solemnly swear (or affirm) that I am the person assessed above, that I have read the foregoing assessment roll of property listed or assessed to me, and that the same is a full, true and correct list of my taxable property, both real and personal property, subject to taxation within this district, and all property which should be listed on this assessment roll to me or by me.

.....

Subscribed and sworn to (or affirmed) this ..... day of... ..A. D...., before me.

..... Assessor.

ASSESSOR'S BOOK.

.....Township, .....County, Iowa.  
 Independent District of.....

Owner's name.	
Under 45.	Polls.
Over 45.	
Number of road district.	
Name or number of school district.	
Part of section or name of town.	
Section or lot.	
Township or block.	
Range.	
Number of acres improved.	
Number of acres unimproved.	
Acres.	Total number of acres taxable.
10.	
Value of new buildings.	
Actual value per acre.	LANDS.
Actual value.	
Actual value.	Lots.
Total actual value of real estate.	
For roads.	Exemption.
For homestead.	
Net actual value of lands and lots.	
Total taxable value of real estate.	
Number.	Colts 1 year old.
Actual value.	
Number.	Colts 2 years old.
Actual value.	
Number.	Horses 3 years old and over.
Actual value.	
Number.	STALLIONS.
Actual value.	
Number.	MULES.
Actual value.	

(CONTINUED)

CATTLE.		Number.	Heifers 1 year old.
		Actual value.	
		Number.	Heifers 2 years old.
		Actual value.	
		Number.	Cows.
		Actual value.	
		Number.	Steers 1 year old.
		Actual value.	
		Number.	Steers 2 years old.
		Actual value.	
		Number.	Steers 3 years old or over.
		Actual value.	
		Number.	Bulls.
		Actual value.	
SWINE.		Number.	
		Actual value.	
Number.	Sheep over 6 months.		
Actual value.			
Number.	Vehicles.		
Actual value.			
Actual value.	H'sld f'n'tre, hotel and b'rding h'se		
Actual value.	Moneys and credits.		
Corporation stocks.			
Merchandise.			
Other personal property.			
Actual value.	Total personal property		
Taxable value.			
Actual value of all property.			
Taxable value.			
Male.	Dogs.		
Female.			

ASSESSMENT ROLL—Form No. 2.

ASSESSMENT OF MONEYS AND CREDITS.

Of.....of.....township of.....state of Iowa, January 1,.....

NOTES, BONDS AND OTHER EVIDENCES OF CREDIT.	ACTUAL VALUE.
Aggregate amount of notes.....	.....
Aggregate amount of bonds.....	.....
Aggregate amount of other written evidences of credit.....	.....
Aggregate amount of money in bank.....	.....
Aggregate amount of other money.....	.....
Aggregate amount of book accounts—good.....	.....
Aggregate amount book accounts—doubtful.....	.....
Aggregate amount of checks, drafts and other cash items.....	.....
<b>Total moneys and credits.....</b>	.....
<b>LIABILITIES.</b>	
Total amount of notes.....	.....
Total amount of accounts.....	.....
Total amount of other debts.....	.....
<b>Total amount of debts.....</b>	.....
<b>Net amount of moneys and credits.....</b>	.....

The party assessed need list only such of his liabilities as he may desire to have subtracted from his moneys and credits.

STATE OF IOWA,.....County, ss.

I,....., do solemnly swear (or affirm) that the above is a full, true and correct statement of all moneys and credits owned by me, and that the liabilities above given to be deducted therefrom are obligations in good faith actually owed by me.

Signed.....

Subscribed and sworn to (or affirmed) before me by..... this.....day of.....

.....Assessor.

[C. '73, § 821; R., §§ 732-3.]  
[27 G. A. ch. 30, § 3.]

**SEC. 1361. Schedules returned.** The assessor shall furnish to each person, partnership, corporation or association, except those otherwise assessed as provided by law, a blank known as "Assessment Roll—Form No. 2," as provided in the preceding section, upon which such person, partnership, corporation or association shall enter and set out all moneys and credits of whatsoever kind or nature belonging to such person, partnership, corporation or association, and such liabilities as they claim should be deducted from the total of their moneys and credits. The assessor shall carry the aggregate moneys and credits of such persons, partnerships, corporation or associations to the regular schedule. The assessor shall return all schedules with the assessment books to the county auditor as is provided in this chapter, and the county auditor shall carefully keep all schedules known and described in this chapter as "Assessment Roll—Form No. 2," for the period of five years from the time of filing of the same in his office. [27 G. A., ch. 30, § 4.]

**SEC. 1364. Plat book.**

As to sufficiency of description, see notes to § 1442.

**SEC. 1371. Clerk—correction of assessments.** The clerk or recorder of the township, city or town, as the case may be, shall be clerk of the board of review, and keep a record of its proceedings, and the assessor shall be

present at its meeting and make upon the assessment rolls all corrections or additions directed by the board. At such meetings it shall be the duty of the assessor to read each and every taxpayer's name and assessment on the assessment rolls, and, if the assessment is approved, pass to next name. After checking the same, the board shall then take up the unchecked names in alphabetical order, and raise or lower the same as in their opinion will be just; checking off each taxpayer as the same is adjusted. [18 G. A., ch. 109, § 1; C. '73, § 831; R., § 740.] [27 G. A., ch. 33, § 1.]

[For annotations, see code, page 486.—Ed.]

**SEC. 1372. Notice of assessment raised.** In case the value of any specific property or the entire assessment of any person, partnership, corporation or association is raised, or new property is added by the board, the clerk shall give immediate notice thereof by mail to each at the post-office address shown on the assessment rolls, and at the conclusion of the action of the board therein the clerk shall post an alphabetical list of those whose assessments are thus raised and added, in a conspicuous place in the office or place of meeting of the board, and enter upon the records a statement that such posting has been made, which entry shall be conclusive evidence of the giving of the notice required. The board shall hold an adjourned meeting, with at least five days intervening after the posting of said notices, before final action with reference to the raising of assessments or the adding of property to the rolls is taken, and the posted notices shall state the time and place of holding such adjourned meeting, which time and place shall also be stated in the proceedings of the board. [18 G. A., ch. 109, § 3.] [27 G. A., ch. 30, § 5.]

[For annotations, see code, pages 486-7.—Ed.]

**SEC. 1373. Complaint to board of review—appeal.**

[For earlier annotations, see code, pages 487-9.—Ed.]

The notice here contemplated must be served on the mayor, who is by law the presiding officer of the city council, unless another presiding officer has been appointed of record. *Frost v. Board of Review*, 113-547.

The district court must have something before it to show what complaint was made to the board of review and what action was taken thereon, and the burden of proof is on the appellant to show that the decision of the board was erroneous. The taking of an appeal does not make an assessing tribunal out of the district court. *Frost v. Board of Review*, 114-103.

The court on appeal may correct the assessment of property in accordance with the application made in the first instance to the board of equalization, but it cannot include property for assessment as to which no assessment has been made, and no question raised before the board of equalization. *Cedar Rapids & M. C. R. Co. v. Cedar Rapids*, 106-476.

The district court on appeal is authorized to determine only the correctness of the assessment with reference to the com-

plaints made, and cannot increase the assessment of appellant. *Farmers' Loan & Trust Co. v. Fonda*, 114-728.

The provision as to complaints to the board of review is broad enough to permit the correction of excessive assessments fraudulently made, and therefore one who complains that his property has been assessed too high on account of discriminations against him as a non-resident should ask relief by application to the board of review, and not by action in equity. The jurisdiction conferred upon the board is exclusive, unless otherwise expressed or clearly manifested. *Crawford v. Polk County*, 112-118.

If the tax is illegal, and not merely irregular, its enforcement may be restrained by injunction. *Montis v. McQuiston*, 107-651.

Where the value fixed by the assessor is by mistake erroneously entered on the tax list, the property owner is not precluded from seeking other relief by failing to apply to the board of review for correction. *Smith v. McQuiston*, 108-363.

**SEC. 1374. Withholding property from assessment—penalty.**

Although the language of this section does not expressly make it retroactive, yet as it refers to an existing condition it may be applied to the collection of taxes on

property omitted from taxation before the Code took effect. *Galusha v. Wendt*, 114-597; *Beresheim v. Arnd*, 90 N. W., 506.

The act of the treasurer in determining

that property has been omitted, and ascertaining the tax due on account thereof is a substitute for the assessment by the duly constituted authorities. *Ibid.*

The act of the assessor for previous years in assessing only a portion of the moneys and credits of a taxpayer does not constitute such an adjudication as to preclude assessment for moneys and credits omitted where such omission resulted from the fraud of the officer or the failure of the taxpayer to return the full amount of his moneys and credits for taxation. *Galusha v. Wendt*, 114-597.

But the mere fact that it appears that subsequently the taxpayer had a larger amount of moneys and credits than had been returned for assessment for previous years will not in itself show liability for taxes on omitted property. *Ibid.*

No penalty can be enforced with reference to taxes which should have been assessed prior to the taking effect of the Code, nor can interest on such taxes be collected from the time when they should have been assessed. *Ibid.*

The property owner cannot in a suit by the county for taxes on omitted property raise the question as to the validity of the contract between the county and attorneys employed for the purpose of discovering omitted property. *Ibid.*

The fact that the penalty provided cannot be imposed in such case does not

defeat the effect of the entire provision as to property previously omitted from taxation. *Beresheim v. Arnd*, 90 N. W., 506.

The fact that the treasurer is authorized to determine the amount for which suit shall be brought in such case and that by Code § 490 a commission on the money collected is allowed to the treasurer does not render the section unconstitutional as making the treasurer a judge in a matter in which he is interested. Under the provision as to treasurer's compensation he is only collaterally and not directly interested in the result of the action. *Ibid.*

While the notice of the action in which the treasurer seeks to recover taxes on omitted property is not the notice contemplated by this section, nevertheless an original notice in another action, indicating that payment of such taxes is demanded, which action is dismissed or otherwise disposed of, may constitute the demand contemplated. *Bell v. Stevens*, 90 N. W., 87.

If such original notice is signed by the treasurer with words indicating that he acts in his official capacity, the court will take judicial notice that he was the treasurer of the county at the date when such notice was served. *Ibid.*

This section is not repealed by the enactment of Chap. 50, acts of 28 G. A., *Lambe v. McCormick*, 89 N. W., 241.

### SEC. 1375. County board of review.

[For earlier annotations, see code page 490.—Ed.]

The power of county boards of equalization is plainly limited to equalizing by adding to, or taking from, the aggregate valuation of townships, cities and towns as a whole, and not as to parts thereof. Such board has no authority to equalize among

assessment districts which are embraced in the same city. The city board has ample power to remedy inequality as among assessment districts by raising or lowering the assessments throughout the city. *Montis v. McQuiston*, 107-651.

**SEC. 1380-a. Repeal.** Section thirteen hundred and eighty (1380) of the code is hereby repealed. [27 G. A., ch. 34, § 4.]

**SEC. 1380-b. State levy.** The executive council shall, in the year 1898, fix the rate per centum to be levied upon the valuation of the taxable property of the state necessary to yield for general state purposes approximately the sum of sixteen hundred thousand dollars (\$1,600,000) and in the year 1899 shall fix the rate necessary to yield approximately fifteen hundred thousand dollars (\$1,500,000). [27 G. A., ch. 34, § 1.]

**SEC. 1380-c. Same.** In the year 1900 and each subsequent year the executive council shall fix the rate per centum to be levied upon the valuation of the taxable property of the state necessary to raise such amount for general state purposes as shall be designated by the general assembly, either by statute or joint resolution. [27 G. A., ch. 34, § 2.]

**SEC. 1380-d. Council to certify to county auditor.** The executive council shall certify the rate so fixed to the auditor of each county. [27 G. A., ch. 34, § 3.]

### SEC. 1385. Errors corrected.

[For earlier annotations, see code, pages 492-3.—Ed.]

The auditor has authority to determine error of judgment on the part of the assessor, when a mistake on the tax list, not due to assessor, has been made, but when the

determination of whether there is a mistake depends upon facts outside the record, it is wise for the auditor to decline to act. *Smith v. McQuiston*, 108-363.

The extension of the application of this section by 28 G. A., chap. 47, and the

enactment of 28 G. A., chap. 50, which may be construed as relating to Code § 1398, do not amount to an implied repeal of Code § 1374. *Lambe v. McCormick*, 89 N. W., 241.

**SEC. 1385-a. Repeal.** That section one thousand three hundred and eighty-five (1385) of the code be and the same is hereby repealed and the following enacted in lieu thereof. [28 G. A., ch. 47, § 1.]

**SEC. 1385-b. Errors—omitted property—how corrected.** The auditor may correct any error in the assessment or tax list, and may assess and list for taxation any omitted property; but before assessing and listing for taxation any omitted property he shall notify by registered letter the person, firm, corporation, or administrator, or other person in whose name the property is taxed, to appear before him at his office within ten days from the time of said notice and show cause, if any there be, why such correction or assessment should not be made, and should such party feel aggrieved at the action of said auditor he shall have the right of appeal therefrom to the district court. And if such correction or assessment is made after the books have passed into the hands of the treasurer he shall be charged or credited therefor as the case may be. All expense incurred in the making of said correction or assessment shall be borne *pro rata* by the funds which are affected by said correction and the proceedings to be reported to the board of supervisors. [28 G. A., ch. 47, § 2.]

**SEC. 1385-c. Appeal.** The appeal herein provided for shall be taken within ten days from the time of the final action of the auditor, by a written notice to that effect to the auditor, and served as an original notice. The court on appeal shall hear and determine the rights of the parties in the same manner as appeals from the board of review, as prescribed in section thirteen hundred and seventy-three (1373) of the code. [28 G. A., ch. 47, § 3.]

**SEC. 1389. Treasurer to enter delinquent taxes.**

[For earlier annotations, see code, pages 493-4.—Ed.]

Where the taxes have not been brought forward as required by statute a sale therefor is invalid and the owner should be permitted to redeem. *Smith v. Callanan*, 103-218.

**SEC. 1389-a. Repeal—treasurer to keep record.** Section thirteen hundred and eighty-nine (1389) of the code is hereby repealed, and the following enacted in lieu thereof:

The treasurer shall, after October 1st, and before December 31st, of each year, enter in a book to be kept in his office as a part of the records thereof, to be known as the delinquent personal tax list, all delinquent personal taxes of any preceding year. [28 G. A., ch. 48, § 1.]

**SEC. 1389-b. What to contain.** Such entry of tax on delinquent personal tax list shall give the names of delinquents alphabetically arranged, with amounts of tax and for what year or years, and where property was located when assessed. [28 G. A., ch. 48, § 2.]

**SEC. 1389-c. Lien on real estate.** Personal tax entered on delinquent personal tax list, as provided in sections one and two of this act, shall constitute a lien on any real estate owned or acquired by any such delinquent, and so remain until the same has been paid or legally canceled, and taxes not so entered for each year shall cease to be a lien. [28 G. A., ch. 48, § 3.]

**SEC. 1389-d. Entry of delinquent real estate taxes.** The treasurer shall each year, upon receiving the tax list, enter upon the same in separate columns opposite each parcel of real estate on which the tax remains unpaid for any previous year, the amount of such unpaid tax, and unless such delinquent real estate tax is so brought forward and entered it shall cease to

be a lien upon the real estate upon which the same was levied, and upon any other real estate of the owner. But to preserve such lien it shall only be necessary to enter such tax, as aforesaid, opposite any tract upon which it was a lien. Any sale for the whole or any part of such delinquent tax not so entered shall be invalid. [28 G. A., ch. 48, § 4.]

**SEC. 1398. Assessment of omitted property.**

[For earlier annotations, see code, page 495.—Ed.]

Although the provisions of 28 G. A., § 1385, nevertheless these acts are not to chap. 50, may be construed as relating to be regarded as repealing Code § 1374. this section, and those of 28 G. A., chap. *Lambe v. McCormick*, 89 N. W., 241. 47, as amplifying the provisions of Code

**SEC. 1400. Lien of taxes.** Taxes upon real estate shall be a lien thereon against all persons except the state. Taxes due from any person upon personal property shall be a lien upon any and all real estate owned by such person or to which he may acquire title. As against a purchaser, such liens shall attach to real estate on and after the thirty-first day of December in each year. Taxes upon stocks of goods or merchandise shall be a lien thereon and shall continue a lien thereon when sold in bulk, and may be collected from the owner, purchaser or vendee. In all cases where buildings are assessed as personal property, the taxes shall be and remain a lien on said buildings from the date of levy until paid. [21 G. A., ch. 133; 20 G. A., ch. 194, § 1; C. '73, §§ 853, 865; R., § 759; C. '51, § 495.] [29 G. A., ch. 59, § 1.]

[For earlier annotations, see code, page 496.—Ed.]

The lien provided for by this section into effect. *Plymouth County v. Moore*, attached, as to taxes already due on stocks 114-700. of goods, on the day when the Code went

## CHAPTER 2.

### OF THE COLLECTION OF TAXES.

**SECTION 1403. Payment—installments.**

[For earlier annotations, see code, pages 497-500.—Ed.]

Where the land is taxed as one parcel, and the mortgage covers a portion only, the mortgagee cannot purchase the entire parcel at tax sale and acquire title so as to divest the owner of the balance of the tract of his title. *Cone v. Wood*, 108-260, and see notes to Sec. 1440.

The weight of authority is that the particular remedy provided by statute for the collection of taxes is exclusive, and held that an action in equity for the enforce-

ment of the lien of the mulct tax against the premises on which a liquor nuisance was situated could not be maintained. *Crawford County v. Laub*, 110-355. So held also as to enforcement of personal property tax under § 1406. *Plymouth County v. Moore*, 87 N. W., 662.

One who makes voluntary payment of taxes cannot recover them back on the ground that they were not legal. *Oden-dahl v. Rich*, 112-182.

**SEC. 1406. Sale of personal property.**

The provisions of this section as to the collection of personal property tax are exclusive of any other remedy, except as pro-

vided by statute, and a personal action cannot be maintained for such tax. *Plymouth County v. Moore*, 114-700.

**SEC. 1407-a. Discovery of property withheld from taxation—contract—notice—appeal.** The board of supervisors of any county may contract in writing with any person to assist the proper officers in the discovery of property not listed and assessed as required by law. Before listing the property discovered, the treasurer shall give the person in whose name it is proposed to assess the same, or his agent, ten days' notice thereof

by registered letter addressed to him at his usual place of residence, fixing the time and place where objection to such proposed listing and assessment may be made. An appeal may be taken to the district court from final action of the treasurer by serving written notice upon him and otherwise proceeding as provided in section thirteen hundred and seventy-three (1373) of the code. [28 G. A., ch. 50, § 1.]

**SEC. 1407-b. Compensation.** The total charges, fees, and expenses authorized under section one (1) of this act shall not exceed fifteen per cent. of the taxes paid into the county treasury. [28 G. A., ch. 50, § 2.]

**SEC. 1407-c. Bond—approval.** The person employed under the provisions of section one hereof shall give a bond in the penal sum of not less than three thousand dollars, with sureties to be approved by the board of supervisors, conditioned for the faithful performance of the contract and observance of the provisions of law applicable to such employment. [28 G. A., ch. 50, § 3.]

**SEC. 1407-d. Disposition of taxes recovered.** After the deduction of the compensation hereinbefore provided for, the taxes recovered under this act shall be distributed among the several funds for that year in the same proportion as other taxes. [28 G. A., ch. 50, § 4.]

**SEC. 1407-e. Existing contracts.** All contracts heretofore made for the purpose specified in section one of this act are hereby declared to be valid and binding, in case the parties interested therein shall, within thirty days from the taking effect of this act, consent in writing to accept the said fifteen per cent. in lieu of all compensation, expenses, and other charges whatsoever provided for in said contracts, and give the bond above required. Unless such consent and bond are given, said contracts are hereby declared null and void. [28 G. A., ch. 50, § 5.]

[The title of the act makes the five preceding sections additional to chapter 2, title VII, of the code, and they are inserted here as the most nearly appropriate place under this chapter.—Ed.]

This act is not unconstitutional as embracing more than one subject-matter or subject-matter not embraced in the title. *Beresheim v. Arnd*, 90 N. W., 506.

The provisions of this act are not to be construed as impliedly repealing Code § 1374. *Lambe v. McCormick*, 89 N. W., 241.

#### **SEC. 1409. Taxes certified to another county.**

It is only when a taxpayer has removed from the county, leaving no property therein out of which the taxes can be made,

that certification of his taxes to another county is authorized. *Union Cent. L. Ins. Co. v. Chapin*, 113-411.

#### **SEC. 1417. Refunding erroneous tax.**

[For earlier annotations, see code, pages 504-6.—Ed ]

The right of action for taxes subsequently paid by a tax purchaser on property as to which it is found that the sale is invalid is barred in five years from the time of payment of such taxes, and is not extended by the provisions of Code § 3448, with reference to an action based on fraud

or mistake. *Lonsdale v. Carroll County*, 105-452.

This section has reference to the county officers, and not to the recovery against a city of taxes collected by a county officer on certification from the city. *Hawkeye L. & B. Co. v. Marion*, 110-468.

#### **SEC. 1419. Notice.**

[For earlier annotations, see code, pages 508-9.—Ed ]

Publication of notice in a particular case held sufficient. *Davis v. Magoun*, 109-308.

#### **SEC. 1421. Advertisement.**

The term "advertisement" here used is meant to include both publication and posting, and irregularity in the posting

will not affect the validity of the sale. *Davis v. Magoun*, 109-308.

**SEC. 1422. Offer for sale.**

[For earlier annotations, see code, pages 509-10.—Ed.]

The sale of two lots in a lump is void. *Hintrager v. McElhinny*, 112-325.

**SEC. 1423. Bid—purchaser.**

[For earlier annotations, see code, page 510.—Ed.]

It is of the highest importance to the owners that the bidders know from the description what is being offered for sale. In a particular case held that a description was not sufficient which described the property as eighteen acres "part of section," etc., with no specification as to the exact boundaries or designation by which the particular part of the section could be

identified. *Armour v. Officer*, 88 N. W., 1058.

Under the provisions of § 876 of the Code of '73, with reference to the sale of the homestead for taxes, held that the provision that the homestead should not be sold for taxes on other property was only applicable when it was listed separately. *Bitzer v. Becke*, 89 N. W., 193.

**SEC. 1426. Resale.**

The intention is that payment for each parcel or portion sold shall be made immediately upon the completion of the sale, and held that a third person paying the

amount bid by the purchaser could not recover from the purchaser the amount of his bid. *Sheldon v. Steele*, 114-616.

**SEC. 1432. Certificate of purchase.**

[For earlier annotations, see code, page 513.—Ed.]

The certificates are intended to be delivered when the sale is completed, and if the money bid is not then paid, a new sale

should be made, under the provisions of Code § 1426. *Sheldon v. Steele*, 114-616.

**SEC. 1433. Assignment.**

[For earlier annotations, see code, pages 513-14.—Ed.]

One who takes the certificate by assignment is subject to notice of all infirmities existing therein. *Young v. Iowa Toolers' Protective Association*, 106-447.

One who by reason of his interest in the

property is bound to pay the taxes, cannot take an assignment of the certificate of sale of the property. Such assignment amounts to a redemption. *Blumenthal v. Culver*, 89 N. W., 1116.

**SEC. 1436. Redemption—how effected.** Real estate sold under the provisions of this chapter may be redeemed at any time before the right of redemption is cut off, by the payment to the auditor, to be held by him subject to the order of the purchaser, of the amount for which the same was sold and eight per cent. of such amount added as a penalty, with eight per cent. interest per annum on the whole amount thus made from the day of sale, and the amount of all taxes, interest and costs paid by the purchaser or his assignee for any subsequent year or years, with a similar penalty added as before on the amount of the payment for each subsequent year, and eight per cent. per annum on the whole of such amount or amounts from the day or days of payment; but the penalty for non-payment of taxes of any subsequent year or years shall not attach, unless the same shall have remained unpaid until the first day of April after they become due and have become delinquent, nor shall said penalties apply to taxes voted in aid of the construction of any railroad. In redeeming from a sale of a leasehold interest in agricultural college land, the amount to be paid shall include any amount paid by the holder of the certificate as interest or principal due by the terms of the lease or otherwise to prevent a forfeiture thereof, as provided by law, and for which proper voucher shall have been filed with the auditor, with interest thereon at eight per cent. per annum from date of payment, which amount shall be paid by the auditor to the holder of the certificate, and the certificate of redemption shall show the amount so paid by the party redeeming. [19 G. A., ch. 45; C. '73, § 890; R., § 779; C. '51, § 505.] [27 G. A., ch. 35, § 1.]

[For earlier annotations, see code, pages 515-17.—Ed.]

Where a person, entitled by decree to redeem from tax sale, deposited the money with the clerk, and moved to compel a conveyance, and was unsuccessful, and thereupon withdrew his money, and the tax title claimant by himself and grantee remained in possession for fifteen years, held that the right to redeem was thereby abandoned. *Cooper v. Cook*, 108-301.

A judgment creditor may redeem from

tax sale the land on which his judgment is a lien. *Swan v. Harvey*, 90 N. W., 489.

One who by reason of his interest in the property is under obligation to pay the taxes cannot acquire title thereto by tax deed, nor take an assignment of the certificate of sale. Such a transaction amounts to a redemption. *Blumenthal v. Culver*, 89 N. W., 1116.

### SEC. 1440. Equitable action.

[For earlier annotations, see code, pages 519-524.—Ed.]

Where proper notice of expiration of period for redemption has not been served, the property owner may have relief under this section, although the deed has in fact been issued. *Hintrager v. McElhinny*, 112-325; *Swan v. Harvey*, 90 N. W., 489.

Where it appears that the rents and profits received by the person in possession are at least equal to the amount which should be paid in making redemption, a decree may be entered without compelling plaintiff to pay anything, and in a particular case held that as the case must be reversed it would be remanded with permission to the person in possession to present his claim for improvements to the lower court for allowance. *Hall v. Cardell*, 111-206.

Where a property owner was found entitled to redeem in equity, held that the defendant should be charged with the rents received, and with interest on the amount received each year, and credited with the amount paid at the tax sale with interest and penalty, and with the amounts paid for subsequent taxes with interest, and also for amounts paid for repairs and care of the property with interest. *Hintrager v. McElhinny*, 112-325.

One who is under obligation to pay taxes upon the property or who has money of another in his possession for the purpose of paying such taxes cannot acquire a tax title as against other interested parties. *Young v. Iowa Toolers' Protective Association*, 106-447.

A mortgagee has the right to pay taxes and cannot by purchase at a tax sale defeat a senior mortgage nor acquire title against mortgagor. *Cone v. Wood*, 108-260.

A tenant in common cannot acquire a valid tax title to property owned in common as against his co-tenant. *Funson v. Bradt*, 105-471.

One who seeks to make equitable redemption must show that he was the owner of or had an interest in the property. *Petersborough Sav. Bank v. Des Moines Sav. Bank*, 110-519.

The action is deemed commenced when the notice is placed in the hands of the sheriff for service, the same rule being applicable as under the general statute of limitations. (See Code § 3450.) *Smith v. Callanan*, 103-218.

[In the first paragraph of notes to this section of the original Code insert "not" after "held" in the fourth line.]

### SEC. 1441. Notice of expiration of right of redemption.

[For earlier annotations, see code, pages 525-530.—Ed.]

The notice of the expiration of the period for redemption is to be given to the person in whose name the land is assessed and taxed at the time the notice is given, rather than at the expiration of two years and nine months from the sale, where the giving of the notice is postponed to a later date than that at which it might first have been given. *Smith v. Callanan*, 103-218.

While an affidavit of a proprietor of a newspaper in which the notice was published is not competent to prove such publication, yet if such affidavit is made a part of the agent's affidavit of notice, the proof is sufficient. *Funson v. Bradt*, 105-471.

An affidavit of notice which does not show that the person making it was the agent or attorney of the holder of the tax certificate is not competent evidence of the facts recited. *Ibid.*

Where the description of the property

in the redemption notice is such as to call the attention of the person upon whom it is served to the sale intended and the property sold, it is sufficient. *Ibid.*

The authority of the treasurer to issue the deed is dependent on the service of redemption notice upon the person to whom the land is taxed and the person in possession, and in the absence of such notice the deed is void and the statutory limitation does not run in his favor. *Chicago, B. & Q. R. Co. v. Kelley*, 105-106.

A notice of expiration of the time for redemption directed to a railway by the initials of its name, such railway being in possession of the property, held, not to be sufficient in the absence of evidence showing that the railway was commonly known and customarily referred to by such abbreviation. *Ibid.*

Where the land was taxed to M. K. G., and there was no such person in the county

at the time for serving notice of expiration of the period of redemption, service by publication was held sufficient, although the premises were in the possession of K. G., who was a resident of the county. *Hawkeye Loan & Brokerage Co. v. Gordon*, 88 N. W., 1081.

Unless the right of redemption be terminated by proper notice the issuance of a treasurer's deed is no obstacle to the exercise of the right, but it must be asserted

by an action as provided in the preceding section. *Swan v. Harvey*, 90 N. W., 489.

Notice cannot be given by a purchaser who has assigned the certificate. *Sickles v. Union Investment Co.*, 109-450.

The notice must be served upon the person in possession. *Hintrager v. McElhinney*, 112-325.

In a particular case held that the return of service of notice was not sufficient. *Ibid.*

### SEC. 1442. Deed executed.

[For earlier annotations, see code, pages 530-2.—Ed.]

Where the description does not furnish the means for determining the boundary line of the tract covered, the deed is not valid. *Tucker v. Carlson*, 113-449.

The description must contain in itself sufficient facts when applied to fix upon the particular tract intended to be conveyed. *Armour v. Officer*, 88 N. W., 1058.

### SEC. 1444. Effect of deed—vests title.

[For earlier annotations, see code, pages 533-9.—Ed.]

What vests in purchaser. There is no privity between the holder of the fee and one who claims a tax title upon the land. The latter title is not derived from, but is antagonistic to the former. The holder of the tax title is not a privy in estate with the holder of the fee. Neither owes any duty to the other, nor is estopped from making any claim against the other. *Hussman v. Durham*, 165 U. S., 144.

A tax title is not derivative, but a new title in the nature of an independent grant from the sovereign, and the one who claims under a tax deed does not therefore claim title from the same source as the person attacking the deed whose title is derived from a foreclosure proceeding, and who

does not show title in the person who executed the mortgage. *Petersborough Sav. Bank v. Des Moines Sav. Bank*, 110-519.

Deed as evidence. It is presumed in favor of the tax deed that service of notice of redemption was not required to be made on a person in possession if the contrary does not appear. *Funson v. Bradt*, 105-471.

Irregularity in posting of notice of tax sale will not affect the validity of the deed. *Davis v. Magoun*, 109-308.

The fact that a deed is issued is *prima facie* evidence of the giving of notice of expiration of the period of redemption. *Young v. Iowa Toolers' Protective Association*, 106-447.

### SEC. 1445. Who may question.

[For earlier annotations, see code, pages 539-543.—Ed.]

One who attacks a tax deed does not make sufficient showing of title by the introduction of the record of foreclosure proceedings and the acquisition of title by him under such proceedings. The title required to be shown is such an one as that the party claiming thereunder might, if plaintiff, recover thereon. *Petersborough Sav. Bank v. Des Moines Sav. Bank*, 110-519.

Whether or not the plaintiff in an action attacking a tax deed must show that a

subsequent sale of the land for taxes has been redeemed from, when the land was purchased at such sale by a stranger, *quacre. Ibid.*

Where the landowner seeks by equitable action to redeem under the provisions of § 1440, he is not required to show title or any payment of taxes as required by this section. A judgment creditor entitled to redeem may maintain such action. *Swan v. Harvey*, 90 N. W., 489.

### SEC. 1446. Sales wrongfully made—purchaser indemnified.

[For earlier annotations, see code, page 543.—Ed.]

The provisions of this section entitle the purchaser to recover only where the mistake or error is that of the treasurer, and not where it is due to the auditor, although the land may by reason of such mistake of the auditor not be subject to sale. *Lonsdale v. Carroll County*, 105-452.

Such provisions do not entitle the tax purchaser to recover from the county, in

case the sale is invalid by reason of mistake or error, the taxes subsequently paid by him on the property. *Ibid.*

Taxes voluntarily paid cannot, in the absence of statute, be recovered, and where the county treasurer collects certified by a city, this section does not authorize recovery from the city of the taxes improperly claimed and paid. To warrant an action

against the city to recover back money on the ground of illegality of taxes or assessments collected by it, it must appear that the city had no authority to collect the tax, that the money sued for has been actually received by the city, and that the payment by the plaintiff was upon compulsion to prevent the immediate enforcement of the tax against his property. *Hawkeye L. & B. Co. v. Marion*, 110-468.

The wrongful act or mistake of the treasurer which will subject the county to an action for the recovery of taxes under this section is one which the person seeking recovery had no agency in bringing about. And where the bondsmen of one

selling intoxicating liquor under the mulct law bought in the real property used for that purpose at a tax sale for the mulct tax, for which his bondsman was liable, the sale being made at his request, held that he could not recover from the county the amount paid by him at such tax sale, which was afterwards set aside. *Guedert v. Emmet County*, 89 N. W., 85.

Evidence in a particular case, showing but little competition at a tax sale, although quite a number of bidders were present, held not sufficient to prove fraud on the part of the purchaser. *Gallaher v. Head*, 108-588.

### SEC. 1448. Limitation of actions.

[For earlier annotations, see code, pages 543-7.—Ed.]

The statute of limitations against the tax deed does not begin to run when the deed is issued without redemption notice being served on the person in whose name the land is taxed, and the same rule applies where the deed is invalid by reason of the failure to notify the person in possession. *Chicago, B. & Q. R. Co. v. Kelley*, 105-106.

The statute begins to run from the time the purchaser is entitled to a deed, but if the holder of the fee title makes a surren-

der to the holder of the tax title, by payment or rent before the five year limit has expired, this will constitute such surrender of possession as to stop the running of the statute. *Gallaher v. Head*, 108-588.

The five years' limitation is only available to one who was the owner of the title at the time of the sale, and if such owner, attacking the tax deed, introduces no evidence of title whatever, he cannot recover. *Gill v. Candler*, 114-332.

## CHAPTER 3.

### OF THE SECURITY OF THE REVENUE.

**SECTION 1457. Loaning or depositing public funds.** A county treasurer shall be liable to a like fine for loaning out, or in any manner using for private purposes, state, county or other funds in his hands, except that, when permitted by the board of supervisors by resolution entered of record, he may deposit such funds in any bank or banks in the state, to any amount fixed by such resolution; and the county may receive such rate of interest on the money so deposited as may be agreed upon by the treasurer, board of supervisors, and the bank; but before such deposit is made such bank shall file a bond with sureties, to be approved by the treasurer and the board of supervisors, in double the maximum amount permitted to be deposited, conditioned to hold the treasurer harmless from all loss by reason of such deposit or deposits. Said bond shall be filed with the county auditor, and action may be brought thereon either by the treasurer or the county, as the board of supervisors may elect. And the state treasurer shall be liable to a fine of not more than ten thousand dollars for a like misdemeanor. But nothing done under the provisions of this section shall alter or affect the liability of the treasurer or the sureties of his official bonds. [17 G. A., ch. 155; C. '73, § 912; R., § 797.] [27 G. A., ch. 36, § 1.]

[For annotations, see code, page 549.—Ed.]

## CHAPTER 4.

## OF ASSESSMENT AND COLLECTION OF COLLATERAL INHERITANCE TAX.

**SECTION 1467. Rate.**

A tax upon succession with an exemption of one thousand dollars is not unconstitutional. *In re McGhee's Est.*, 105-9.

The statutory provision (26 G. A., chap. 28), subjecting property of an estate passing by will or intestate succession other than to certain named relatives to a tax of five per cent. of its value above the sum of one thousand dollars after the payment of all debts, exempts from taxation one thousand dollars of the entire estate and not one thousand dollars of the share coming to each distributee. *Ibid.*

The valuation of the property under such statute is to be made by appraisalment and not determined by the regular assessment. Such value is the price which

the property will command in the market. *Ibid.*

The exemption provided for under this section is of all estates of less than \$1,000, and if the estate exceeds that amount all the property passing to collateral heirs is subject to the tax. The \$1,000 exemption is not deducted from each share. *Herriott v. Bacon*, 110-342.

The situs of the property, and not the testator's domicile, determines the liability of the property for the inheritance tax, and where a resident of Iowa died possessed of cattle in an adjoining state which passed under his will to collateral heirs, held that such cattle, or the proceeds thereof, were not liable to the tax. *In re Weaver's Est.*, 110-328.

**SEC. 1467-a. Debts deducted.** The term "debts" in the eleventh line of section fourteen hundred and sixty-seven (1467) of the code shall include, in addition to debts owing by decedent at the time of his death, the local or state taxes due from the estate prior to his death, and a reasonable sum for funeral expenses, court costs, including the costs of appraisalment made for the purpose of assessing the collateral inheritance tax, the statutory fees of executors, administrators, or trustees, and no other sum; but said debts shall not be deducted unless the same are approved and allowed, within fifteen months from the death of decedent, as established claims against the estate, unless otherwise ordered by the judge or court of the proper county. [28 G. A., ch. 51, § 1.]

**SEC. 1467-b. Property subject to tax.** Except as to property passing to the persons, corporations, and societies exempted by section fourteen hundred and sixty-seven (1467) of the code from the collateral inheritance tax, and real property located outside of the state passing in fee from the decedent owner, the tax imposed under chapter four (4) of title seven (7) of the code shall hereafter be assessed against, and be collected from, property of every kind, which, at the death of the decedent owner, is subject to, or thereafter, for the purpose of distribution, is brought into this state and becomes subject to the jurisdiction of the courts of this state for distribution purposes, or which was owned by any decedent domiciled within the state at the time of the death of such decedent, even though the property of said decedent so domiciled was situated outside of the state. [28 G. A., ch. 51, § 2.]

**SEC. 1467-c. Construction.** In the construction of this statute, the words "collateral heirs" shall be held to mean all persons who are not excepted from the provisions of the collateral inheritance tax by section fourteen hundred and sixty-seven (1467) of the code, and this act, except section two (2) thereof, shall apply to all pending estates which are not closed, and the property subjected by this act to the said tax is liable to the provisions incorporated in chapter four (4) of title seven (7) of the code, as to the amount and lien thereof, and the manner of enforcement and collection thereof, except as herein specifically provided otherwise. [28 G. A., ch. 51, § 12.]

**SEC. 1467-d. Foreign estates and deduction of debts.** Whenever any property belonging to a foreign estate, which estate, in whole or in part, is liable to pay a collateral inheritance tax in this state, the said tax shall be

assessed upon the market value of said property remaining after the payment of such debts and expenses as are chargeable to the property under the laws of this state; in the event that the executor, administrator, or trustee of such foreign estate files with the clerk of the court having ancillary jurisdiction, and with the treasurer of state, duly certified statements exhibiting the true market value of the entire estate of the decedent owner, and the indebtedness for which the said estate has been adjudged liable, which statement shall be duly attested by the judge of the court having original jurisdiction, the beneficiaries of said estate shall then be entitled to have deducted such proportion of the said indebtedness of the decedent from the value of the property as the value of the property within this state bears to the value of the entire estate. [28 G. A., ch. 51, § 3.]

**SEC. 1467-e. Foreign estates and direct and collateral beneficiaries.**

Whenever any property, real or personal, within this state belongs to a foreign estate, and said foreign estate passes in part exempt from the collateral inheritance tax, and in part subject to said collateral inheritance tax, and it is within the authority or discretion of the foreign executor, administrator, or trustee administering the estate to dispose of the property, not specifically devised to direct heirs or devisees in the payment of the debts owing by decedent at the time of his death, or in the satisfaction of legacies, devise[s], or trusts given to direct and collateral legatees or devisees, or in payment of the distributive shares of any direct and collateral heirs, then the property within the jurisdiction of this state, belonging to such foreign estate, shall be subject to the collateral inheritance tax imposed by chapter four (4) of title seven (7) of the code, and the tax due thereon shall be assessed as provided in the next preceding section of this act, and with the same proviso respecting the deduction of the proportionate share of the indebtedness, as therein provided. [28 G. A., ch. 51, § 4.]

**SEC. 1469. Appraisal.**

Where title to the real property belonging to deceased had vested absolutely in heirs prior to the enactment of 27 G. A., chap. 37, held that the legalizing act did not cure the defect in the law existing at the time inheritance was cast, and therefore did not render the tax valid as against the inheritance by the heirs. *Herriott v. Potter*, 89 N. W., 91.

The appraisal made of the personal property by the regularly appointed appraisers seems to be made the basis for

the limitation of the tax on that kind of property. No notice to the heirs, legatees or devisees is provided for or required, and therefore this section, is unconstitutional. The tax is a property tax, and not a tax on succession, but the provision for notice contained in 27 G. A., chap. 37, which is made retroactive, cures the defect as to estates not settled at the time the act was passed and a tax previously levied is rendered valid by said act. *Ferry v. Campbell*, 110-290.

**SEC. 1471-a. Valuation of life, term and deferred estates.** The value of any estate and property described in sections fourteen hundred and seventy (1470) and fourteen hundred and seventy-one (1471) of the code subject to the collateral inheritance tax shall be determined for the purpose of computing said tax by the rule or standards of mortality and of value commonly used in actuaries' combined experience tables. The treasurer of state is directed to obtain and publish for the use of the courts and appraisers throughout the state tables showing the average expectancy of life, and the value of annuities or life and term estates, and the present worth or value of remainders and reversions. The taxable value of life or term, deferred or future, estates shall be computed at the rate of four per cent. interest. Whenever it is desired to remove the lien of the collateral inheritance tax on remainders, reversions, or deferred estates, parties owning the beneficial interest may pay at any time the said tax on the present worth of such interest determined according to the rules herein fixed. [28 G. A., ch. 51, § 7.]

[The tables promulgated by the treasurer of state, together with the rules adopted by the judges, will be found at the end of this chapter.—Ed.]

[For compensation of appraisers appointed under this chapter, as well as appraisers generally, see section 1490-a, *supra*.—Ed.]

**SEC. 1475-a. Surplus tax—how and when refunded.** That when a court of competent jurisdiction has or may hereafter determine that property, upon which a collateral inheritance tax has been paid, is not subject to or liable for the payment of such tax, so much of such tax which has been overpaid to the treasurer of state, shall be returned or refunded to the executor or administrator of such estate, or to those entitled thereto, when a certified copy of the record of such court showing the fact of non-liability of such property to the payment of such tax has been filed with the executive council of the state, the executive council shall issue an order to the auditor of the state directing him to issue a warrant upon the treasurer of the state to refund such tax. [29 G. A., ch. 63, § 1.]

**SEC. 1475-b. Notice of hearing.** Such order of court shall not be given until fifteen days notice of the application therefor shall be given to the treasurer of state of the time and place of the hearing of such application, which notice shall be served in the same manner as provided for original notices. [29 G. A., ch. 63, § 2.]

**SEC. 1476. Method of appraisement—notice—hearing—appeal.** All appraisements of real estate subject to such tax shall be made and filed in the manner provided for appraisement of personal property. When such real estate is situated in another county, the same appraisers may serve, or others may be appointed. It shall be the duty of all appraisers appointed under the provisions of this chapter to forthwith give notice to the treasurer of state and other persons known to be interested in the property to be appraised, of the time and place at which they will appraise such property, which time shall not be less than ten days from the date of such notice. The notice shall be served in the same manner as is prescribed for the commencement of civil actions unless a different one is ordered by the court or judge, and the notice, with the proof of service thereof, shall be returned to the court with the appraisement. The treasurer of state, or any person interested in the estate appraised, may file exceptions to the appraisement, on the hearing of which, as an action in equity, either party may produce evidence competent or material to the matters therein involved. If, upon such hearing, the court finds the amount at which the property is appraised is its value on the market in the ordinary course of trade, and the appraisement was fairly and in good faith made, it shall approve such appraisement; but if it finds that the appraisement was made at a greater or less sum than the value of the property in the ordinary course of trade, or that the same was not fairly or in good faith made, it shall set aside the appraisement, appoint new appraisers and so proceed until a fair and good appraisement of the property is made at its value in the market in the ordinary course of trade. The treasurer of state, or any one interested in the property appraised may appeal to the supreme court from the order of the district court approving or setting aside any appraisement to which exceptions have been filed. Notice of appeal shall be served within thirty days from the date of the order appealed from, and the appeal shall be perfected in the time now provided for appeals in equitable actions. In case of appeal the appellant, if he is not the treasurer of state, shall give bond to be approved by the clerk of the court, to pay the tax, which bond shall provide that the said appellant and sureties shall pay the tax for which the property may be liable, with costs of the appeal. [26 G. A., ch. 28, § 10.] [27 G. A., ch. 37, § 1.]

**SEC. 1476-a. Appraisements and relief therefrom.** All estates, subject in whole or in part to the tax imposed upon collateral inheritances, shall be appraised for the purpose of computing said tax by the regular collateral inheritance tax appraisers, under the rules and regulations authorized to be made by section six (6) of chapter thirty-seven (37) of the laws of the twenty-seventh general assembly governing the district courts in the assessment of said tax; provided, that estates in some part liable for the payment

of the inheritance tax need not be entirely appraised by the collateral inheritance appraisers where an appraisement of such part will be sufficient to determine the tax due the state, and estates liable for the collateral inheritance tax, which consist of money, book accounts, bank deposits, notes, mortgages, and bonds, need not be appraised by the collateral tax appraisers if the administrator, executor, or trustee, or the beneficiaries claiming such property, are willing to charge themselves and to pay the collateral inheritance tax upon the full face value of such properties, as may be shown in their inventories, together with the interest or earnings which may be due on said properties, but in all cases the relief of such personal property from appraisement for the collateral inheritance tax is dependent upon the consent of the treasurer of state, and the subsequent approval thereof by the judge or the proper court. In the event that the estate has been duly appraised under the ordinary statutes of inheritance, and such appraisement is accepted by the treasurer of state as satisfactory for the collateral inheritance tax, the district court or judge of the proper court may, upon proper application, relieve the estate from the appraisement by the collateral inheritance tax appraisers; but, in order to obtain such relief, the administrator, executor, trustee, or other party interested must file an application in the office of the clerk of the court for such relief before said clerk issues a commission to the collateral inheritance tax appraisers. The district court or judge of the proper court may, upon application of the representatives of the estate or parties interested, relieve the estate of the appraisement for collateral tax purposes if it be shown to said court that the market value of the entire estate subject to tax will not exceed one thousand dollars, provided, that, prior to the application to said court or judge, the written consent of the treasurer of state to such relief is procured. In all cases where an estate is relieved from an appraisement for collateral inheritance tax purposes, the fact of such relief and the reasons therefor shall be duly noted in the decree or order of final settlement made by the court. [28 G. A., ch. 51, § 5.]

**SEC. 1476-b. Rules and regulations.** The chief justice of the supreme court shall, prior to July first, 1898, appoint five of the district judges of the state to meet with him at Des Moines on a date to be by him fixed for the purpose of framing uniform rules and regulations, relative to the assessment and collection of the collateral inheritance tax, for the guidance of the district judges, officers of the court, executors and administrators. Said rules and regulations shall aim to give more publicity to the provisions of this chapter, and to secure the strict enforcement of the same, and when made shall form a part of and be published with the rules of the district courts of the state. [27 G. A., ch. 37, § 6.]

[The rules adopted by the judges, provided for above, together with the tables promulgated by the treasurer of state to determine the value of annuities, life and term estates, and the present worth of remainders and reversions, will be found at the end of this chapter.--Ed.]

**SEC. 1477-a. Real estate.** In all cases where real estate has been subject to or liable for the payment of the tax provided in this chapter, or where any real estate has heretofore been appraised and the tax not yet paid and the notice required in section one of this act was not given, it shall be the duty of the proper court, immediately upon the taking effect of this act, to enforce such tax, or to set aside any appraisement heretofore made, and order a re-appraisement of the same to be made as in this act provided, anything in the law to the contrary notwithstanding. [27 G. A., ch. 37, § 2.]

**SEC. 1477-b. Corporate stock.** If a foreign executor, administrator or trustee shall assign or transfer any corporate stock or obligations in this state standing in the name of a decedent, or in trust for a decedent, liable to such tax, the tax shall be paid to the treasurer of state on or before the transfer thereof; otherwise the corporation permitting its stock to be so transferred

shall be liable to pay such tax and it is the duty of the treasurer of state to enforce the payment thereof. [27 G. A., ch. 37, § 3.]

**SEC. 1477-c. Securities and assets.** No safe deposit company, trust company, bank or other institution, person or persons holding securities or assets of the decedent shall deliver or transfer the same to the executor or administrator or legal representative of said decedent unless notice of the time and place of such intended transfer be served upon the state treasurer at least five days prior to the transfer thereof, or unless the tax for which such securities or assets are liable under chapter four (4), title seven (7) of the code shall be first paid. It shall be lawful for, and the duty, of the treasurer of state to personally, or by any person by him duly authorized, to examine such securities or assets at the time of such delivery or transfer. Failure to serve such notice upon the treasurer of state or to allow such examination on the delivery of such securities or assets to such executor, administrator or legal representative before said tax is paid shall render such safe deposit company, trust company, bank or other institution, person or persons liable for the payment of the taxes due upon such securities or assets as provided in said chapter four (4). [27 G. A., ch. 37, § 4.]

**SEC. 1477-d. County attorney—compensation.** It shall be the duty of the county attorney of each county to report to the treasurer of state the death of all persons whose estates are liable to payment of the collateral inheritance tax, and the description of any property located in the county liable to such tax, and to perform such further legal services in the enforcement of said tax as he may be directed to do by the treasurer of state, but such attorney shall have no authority to receipt for or receive any of such tax. For reporting such estates or property the county attorney shall receive a compensation of ten (10) per cent. of the tax payable to the state, but not to exceed the sum of twenty (\$20) dollars in any one estate; and for additional legal services performed under the direction of the treasurer of state he shall be paid a compensation of three (3) per cent. on the amount of all taxes collected from estates so reported by him, but in no event shall the amount thereof exceed the sum of one hundred and fifty (\$150) dollars from any one estate. When the treasurer of state is satisfied that an estate reported by the county attorney is liable to the tax he shall so certify to the auditor of state, who shall issue his warrant on the treasurer of state in favor of said county attorney for the sum due for reporting said estate as herein provided, and all other compensation shall be paid said county attorney in like manner when the tax is collected and paid into the state treasury. [27 G. A., ch. 37, § 7.]

**SEC. 1477-e. Regulations as to fees of county attorneys.** In the event of uncertainty or of conflicting claims as to fees due county attorneys, under section seven (7) of chapter thirty-seven (37) of the laws of the twenty-seventh general assembly, the treasurer of state is empowered to determine the amount of fees, under the limitations of said section, to whom payable, and when the same are due, and as far as possible such determination shall be in accord with fixed rules made by the state treasurer. [28 G. A., ch. 51, § 11.]

**SEC. 1478-a. Reports to be filed with treasurer of state.** Administrators, executors, and trustees of the estates subject to the collateral inheritance tax shall, when demanded by the treasurer of state, send to such treasurer certified copies of such parts of their reports as may be deemed [demanded] by the treasurer of state, and upon the refusal of said parties to comply with the demand of the treasurer of state, it is the duty of the clerk of the court to comply with such demand, and the expenses of making such copies and transcripts shall be charged against the estate, as are other costs in probate. [28 G. A., ch. 51, § 9.]

**SEC. 1478-b. Compromise settlements.** Whenever an estate charged, or sought to be charged, with the collateral inheritance tax is of such a

nature, or is so disposed, that the liability of the estate is doubtful, or the value thereof cannot, with reasonable certainty, be ascertained under the provisions of law, the treasurer of state may, with the written approval of the attorney-general, which approval shall set forth the reasons therefor, compromise with the beneficiaries or representatives of such estates, and compound the tax thereon; but said settlement must be approved by the district court or judge of the proper court, and after such approval the payment of the amount of the taxes so agreed upon shall discharge the lien against the property of the estate. [28 G. A., ch. 51, § 8.]

**SEC. 1478-c. Payment of costs.** In any action where the state has been a party in enforcing the collection of the collateral inheritance tax, and a decision adverse to the state has been rendered, with an order that the state pay the costs, it is the duty of the clerk of the court in which such action was pending to certify the amount of such costs to the treasurer of state, who shall, if said costs be correctly certified, and the case has been finally terminated, present the claim to the executive council to audit, and, said claim being allowed by said council, the auditor of state is directed to issue a warrant on the state treasurer in payment of such costs. [28 G. A., ch. 51, § 10.]

**SEC. 1479-a. List of heirs.** In all of the estates subject to the payment of the collateral inheritance tax it shall be the duty of the executor, administrator or trustee to furnish the clerk of the court a list of the heirs as required in section thirty-four hundred and twelve (3412) of the code and to state therein in a separate column the relationship which each heir, devisee or legatee bears to the decedent. The clerk of the court shall immediately forward a true copy of such list to treasurer of state, and no final settlement of the account of any executor, administrator or trustee shall be accepted or allowed unless a strict compliance with the provisions of this section has been had by such person. [27 G. A., ch. 37, § 5.]

**SEC. 1479-b. Date of filing inventories of personalty.** Whenever, by reason of the complicated nature of an estate, or by reason of the confused condition of the decedent's affairs, it is impracticable for the executor, administrator, or trustee or beneficiary of said estate to file with the clerk of the court a full, complete, and itemized inventory of the personal assets belonging to the estate, within the time required by statute for filing inventories of the estates, the court may, upon the application of such representatives or parties in interest, extend the time for the filing of the collateral inheritance appraisalment for a period not to exceed three months beyond the time fixed by law. [28 G. A., ch. 51, § 6.]

TABLES FOR DETERMINING THE VALUATION OR PRESENT WORTH OF LIFE AND TERM ESTATES OR ANNUITIES AND REMAINDERS OR REVERSIONARY INTERESTS COMPUTED AT FOUR PER CENT. PER ANNUM FOR THE USE OF THE COURTS OF IOWA IN THE ASSESSMENT OF THE COLLATERAL INHERITANCE TAX.

STATE OF IOWA,  
TREASURY DEPARTMENT. }  
DES MOINES, JULY 15, 1900. }

Section seven (7) of chapter fifty-one (51) of the acts of the twenty-eighth (28) general assembly provides:

"The treasurer of state is directed to obtain and publish for the use of the courts and appraisers throughout the state tables showing the average expectancy of life and the values of annuities of life and term estates, and the present worth or value of remainders and reversions. The taxable value of life or term, deferred or future estates shall be computed at the rate of 4 per cent. interest."

Pursuant to the foregoing provisions, the following tables for determining the taxable value, namely, the present worth, of life estates or annuities and remainders or reversionary interests are hereby published and promulgated for the use of the courts and appraisers of the state.

Table I gives the basis for valuing "Life Estates" or annuities, the proceeds of which the beneficiary enjoys during his or her life.

Table II relates to "Term Estates" or annuities terminable at a certain period, definitely stated in the provisions of the instrument creating the estate.

The tables printed herein are those used by the United States government in the assessment of the inheritance tax under the war revenue act of June 13, 1898, prepared for the internal revenue service under the direction of the government actuary, Mr. J. S. McCoy. They are based upon the "Actuaries or Combined Experience Tables," money being considered worth four (4) per cent. per annum. Both the tables and notes are reproduced from circulars No. 527, March, 1899, and No. 21,231, December, 1899, issued by the commissioner of internal revenue.

The treasurer of state is indebted to Honorable G. W. Wilson, commissioner of internal revenue at Washington, D C. for permission to reprint and use the tables employed by the national government, and he desires here to acknowledge the courtesy and the very valuable favor rendered by him.

JOHN HERRIOTT,  
*Treasurer of State of Iowa.*

Table No. 1. Single-life, 4 per cent., showing the present worth of an annuity, or life interest, and of a reversionary interest.

Age.	Mean redemption period.	Annuity or present value of one dollar due at the end of each year during the life of a person of specified age.	Reversion, or present value of one dollar due at the end of the year of death of a person of specified age.	Age.	Mean redemption period.	Annuity or present value of one dollar due at the end of each year during the life of a person of specified age.	Reversion, or present value of one dollar due at the end of the year of death of a person of specified age.
0	23.179	\$14.72829	\$0.39507	50	18.113	\$12.47032	\$0.48191
1	30.552	17.30771	0.29586	51	17.527	12.17919	0.49311
2	35.626	18.69578	0.24247	52	16.947	11.88408	0.50446
3	37.572	19.15901	0.22465	53	16.372	11.58531	0.51595
4	38.702	19.41226	0.21491	54	15.804	11.28325	0.52757
5	39.352	19.55301	0.20950	55	15.243	10.99789	0.53931
6	39.654	19.61731	0.20703	56	14.689	10.66982	0.55116
7	39.691	19.62502	0.20673	57	14.143	10.35931	0.56310
8	39.625	19.61097	0.20727	58	13.603	10.04630	0.57514
9	39.264	19.53413	0.21022	59	13.072	9.73131	0.58726
10	38.891	19.45359	0.21332	60	12.549	9.41474	0.59943
11	38.507	19.36943	0.21656	61	12.029	9.09765	0.61163
12	38.113	19.28184	0.21993	62	11.532	8.78052	0.62382
13	37.710	19.19065	0.22344	63	11.039	8.46412	0.63600
14	37.298	19.09590	0.22708	64	10.557	8.14888	0.64812
15	36.877	18.99764	0.23086	65	10.088	7.83552	0.66017
16	36.447	18.89569	0.23478	66	9.630	7.52476	0.67212
17	36.010	18.79010	0.23884	67	9.185	7.21699	0.68396
18	35.565	18.68070	0.24305	68	8.753	6.91298	0.69565
19	35.113	18.56751	0.24740	69	8.333	6.61301	0.70719
20	34.652	18.45038	0.25191	70	7.926	6.31716	0.71857
21	34.186	18.32932	0.25656	71	7.532	6.02612	0.72976
22	33.711	18.20416	0.26138	72	7.151	5.74003	0.74077
23	33.230	18.07471	0.26636	73	6.782	5.45928	0.75157
24	32.742	17.94097	0.27150	74	6.425	5.18402	0.76215
25	32.248	17.80274	0.27682	75	6.081	4.91463	0.77251
26	31.747	17.65984	0.28231	76	5.749	4.65125	0.78264
27	31.239	17.51224	0.28799	77	5.428	4.39383	0.79254
28	30.725	17.35968	0.29386	78	5.119	4.14286	0.80220
29	30.205	17.20225	0.29991	79	4.823	3.89858	0.81159
30	29.678	17.03961	0.30617	80	4.537	3.66071	0.82074
31	29.147	16.87176	0.31262	81	4.262	3.42900	0.82965
32	28.608	16.69846	0.31929	82	3.995	3.20258	0.83836
33	28.067	16.51964	0.32617	83	3.737	2.98024	0.84691
34	27.516	16.33503	0.33327	84	3.484	2.76106	0.85534
35	26.961	16.14437	0.34060	85	3.236	2.54366	0.86371
36	26.401	15.94755	0.34817	86	2.992	2.32795	0.87200
37	25.834	15.74427	0.35599	87	2.752	2.11384	0.88024
38	25.263	15.53421	0.36407	88	2.517	1.90115	0.88842
39	24.685	15.31722	0.37241	89	2.286	1.69107	0.89650
40	24.101	15.09295	0.38104	90	2.062	1.48540	0.90441
41	23.511	14.86102	0.38996	91	1.845	1.28432	0.91214
42	22.915	14.62122	0.39918	92	1.637	1.09024	0.91961
43	22.313	14.37356	0.40871	93	1.442	0.90647	0.92667
44	21.708	14.11860	0.41852	94	1.263	0.73687	0.93320
45	21.103	13.85713	0.42857	95	1.103	0.58435	0.93906
46	20.499	13.58958	0.43886	96	0.975	0.46182	0.94378
47	19.896	13.31698	0.44935	97	0.877	0.36698	0.94742
48	19.298	13.03942	0.46002	98	0.746	0.24038	0.95229
49	18.703	12.75716	0.47088	99	0.500	0.00000	0.96154

## EXPLANATORY NOTES AND EXAMPLES.

The first column shows the age of the person under consideration.

The second column shows the corresponding "mean redemption period" and represents the time in years in which the present values of annuities and reversions certain will become equal, respectively, to the present value of annuities and reversions contingent on the duration of life. The "mean redemption period" is a mean between the last payment of the annuity and the payment of the reversion, averaging six months later than the former payment and six months earlier than the latter payment. (This period is ordinarily designated the expectancy of life during which a beneficiary will enjoy the life estate.)

The third column shows the present value of an annuity for life of one dollar per annum, the last payment being made at the end of the year prior to the one in which death occurs.

The fourth column shows the present worth of one dollar payable at the end of the year in which death occurs.

## EXAMPLE 1.

A person dying bequeaths to his nephew, aged forty years, an annuity of one thousand dollars during life. What is the present value of the annuity?

Reference to the foregoing table shows that the present value of one dollar a year, payable at the end of each year during the life of a person aged forty years, is fifteen dollars nine cents two mills and ninety-five one-hundredths of a mill (\$15.09295); therefore, the present value of one thousand dollars is one thousand times as much, or fifteen thousand and ninety-two dollars and ninety-five cents, the amount upon which tax accrues.

## EXAMPLE 2.

A person dying bequeaths to his sister, aged thirty-five years, a life interest in personal property amounting to fifty thousand dollars (\$50,000.00), the estate to revert absolutely at her death to other collateral parties. Required the present value, at the date of death of the testator, of the life interest of the sister in the estate; also, required at the same date, the present value of the reversionary interest of said other parties in the estate.

At a net interest of four per cent. per annum, the assumed rate, the estate of \$50,000.00 will realize an income or annuity of \$2,000.00 per annum. The present value of the sum of \$1.00, payable at the end of each year during the life of a person aged thirty-five years, is found by the table to be \$16.14437, and the present value of an annuity of \$2,000.00 for the same time would be two thousand times as much, or \$32,288.74, the amount upon which tax accrues.

The reversion or present value of \$1.00, due at the end of the year of death of a person aged thirty-five years, is found by the table to be \$0.34060, and such value of \$50,000.00 would be fifty thousand times as much, or \$17,030.00, the amount upon which tax accrues.

Table No. II. Present value of annuities and reversions certain upon a 4 per cent. basis.

Number of years.	Present worth of an annuity of one dollar, payable at the end of each year, for a certain number of years.	Present worth of one dollar, payable at the end of a certain number of years.	Number of years.	Present worth of an annuity of one dollar, payable at the end of each year, for a certain number of years.	Present worth of one dollar, payable at the end of a certain number of years.
	<i>Annuity.</i>	<i>Reversion.</i>		<i>Annuity.</i>	<i>Reversion.</i>
1	\$ 0.96154	\$0.961538	16	\$11.65229	\$0.533908
2	1.88609	0.924556	17	12.16567	0.513373
3	2.77509	0.888996	18	12.65929	0.493628
4	3.62989	0.854804	19	13.13394	0.474642
5	4.45182	0.821927	20	13.59032	0.456387
6	5.24214	0.790314	21	14.02916	0.438834
7	6.00205	0.759918	22	14.45111	0.421955
8	6.73274	0.730690	23	14.85684	0.405726
9	7.43533	0.702587	24	15.24696	0.390121
10	8.11089	0.675564	25	15.62208	0.375117
11	8.76047	0.649581	26	15.98277	0.360689
12	9.38507	0.624597	27	16.32958	0.346816
13	9.98565	0.600574	28	16.66306	0.333477
14	10.56312	0.577475	29	16.98371	0.320651
15	11.11839	0.555265	30	17.29203	0.308319

## EXAMPLE.

A man dies leaving personal property to the amount of \$50,000.00. His niece is to have the income from it for 20 years, it then to revert to his youngest brother. What is the present worth of these legacies?

The income of \$50,000.00 would be \$2,000.00 per annum, assuming money at 4 per cent.

The present worth of an annuity of \$2,000.00 for 20 years will be 2,000 times an annuity of \$1.00 for 20 years. In the table opposite 20 we find the value of an annuity of \$1.00 to be \$13.59032, therefore the present worth of an annuity of \$2,000.00 will be \$27,180.64.

A reversion of \$1.00 at the end of 20 years is shown by the table to be \$0.456387, and a reversion of \$50,000.00 will be 50,000 times as much, or \$22,819.35.

STATE OF IOWA,  
TREASURY DEPARTMENT,  
DES MOINES. }

The following rules and regulations for the assessment and collection of the tax on collateral inheritances in Iowa were drafted and adopted in accordance with the provisions of section six, chapter thirty-seven, of the acts of the Twenty-seventh General Assembly, which follow:

The chief justice of the supreme court shall, prior to July 1, 1898, appoint five of the district judges of the state to meet with him at Des Moines on a date to be by him fixed, for the purpose of framing uniform rules and regulations relative to the assessment and collection of the collateral inheritance tax, for the guidance of the district judges, officers of the court, executors and administrators. Said rules and regulations shall aim to give more publicity to the provisions of this chapter, and to secure the strict enforcement of the same, and when made shall form a part of and be published with the rules of the district courts of the state.

Pursuant to the authority conferred in the above section, Judge H. E. Deemer, chief justice of the supreme court, directed Judges S. M. Weaver, of the Eleventh judicial district; L. E. Fellows, of the Thirteenth; H. M. Towner, of the Third; Z. A. Church, of the Sixteenth, and M. J. Wade, of the Eighth judicial district of Iowa, to meet with him in Des Moines. The rules

and regulations for the assessment and collection of the collateral inheritance tax herewith published were adopted June 11, 1898.

JOHN HERRIOTT,  
*Treasurer of State.*

RULES AND REGULATIONS RELATING TO THE ASSESSMENT  
AND COLLECTION OF THE COLLATERAL INHERITANCE TAX.

RULE 1.

**Lien book.** The clerk of the district court in and for each county shall provide and keep a suitable book, substantially bound and suitably ruled, to be known as the Collateral Inheritance Tax and Lien Book, in which shall be kept a full and accurate record of all proceedings in cases where property is charged or sought to be charged with the payment of a collateral inheritance tax under the laws of this state, to be printed and ruled so as to show, upon one page:

1. The name, place of residence, and date of death of the decedent.
2. Whether the decedent died testate, or intestate, and if testate, the record and page where the will was probated and recorded.
3. The name and post-office address of the executor, administrator, trustee, or grantee, with date of appointment or transfer.
4. The names, post-office addresses and relationship, if known, of all the heirs, devisees and grantees.
5. The appraised valuation of the personal property.
6. The amount of inheritance tax due upon said personal property.
7. A record of payment with amount and date.
8. Date of filing objections and names of objectors.
9. Blank for index and reference to all proceedings, and for memorandum entries of the court or judge in relation thereto.

Upon the opposite page of such record shall be printed:

1. "Real estate derived from ..... (naming decedent) which is subject to the lien prescribed by the statute for collateral inheritance tax."
2. A full and accurate description of such real estate, by forty acre or fractional tracts, or by lots, or other complete individual description.
3. The appraised valuation as reported by the appraisers,—with a reference to the record of their report,—as to each piece of such real estate.
4. The amount of the inheritance tax due upon each such piece.
5. A record of payments, with dates and amounts.
6. Date of filing objections, and names of objectors.
7. Blank for index and reference to all proceedings, and for memorandum entries of court or judge in relation thereto.

RULE 2.

**Report by administrators, etc.** Upon the appointment and qualification of each executor, administrator and testamentary trustee, the clerk issuing the letters shall at the same time deliver to him a blank form upon which he shall be required to make detailed report of the following facts:

1. Name and last residence of decedent.
2. Date of death.
3. Whether or not he left a will.
4. Name and post-office of executor, administrator or trustee.
5. Name and post-office of surviving wife or husband, if any.
6. If testate, name and post-office of each beneficiary under will.
7. Relationship of each beneficiary to the testator.
8. If intestate, name and post-office of each heir at law.
9. Relationship of each heir at law to the decedent.

10. Inventory of all the real estate of the decedent, giving amount and description of each tract.

Within ten days after his qualification each executor, administrator and testamentary trustee shall make and return to the clerk, under oath, a full and detailed report as indicated in the preceding paragraph, and upon his failure so to do, the clerk shall forthwith report his delinquency to the district court if in session, or to a judge of said court if in vacation, for such order as may be necessary to enforce an observance of these rules.

If it appears from the inventory or report so filed, that the real estate, or any part of it, is subject to an inheritance tax, it shall be the duty of the executor or administrator to cause the lien of the same to be entered upon the lien book in the office of the clerk of the court in each county where each particular tract of said real estate is situated.

#### RULE 3.

**Duties of the clerk.** The clerk shall from time to time enter upon the collateral inheritance tax and lien book, the title of all estates subject to the inheritance tax, as shown by the inventories or lists of heirs filed in his office, or as reported to him by the county attorney or the treasurer of state, and shall enter in said book as against each estate or title at the appropriate place, all such information relating to the situation and condition of the estate as he may be able to obtain from the papers filed in his office, or from the county attorney or the treasurer of state, as may be necessary to the collection and enforcement of the tax. He shall also immediately index all liens entered upon the collateral inheritance tax and lien book in the book kept in his office for that purpose.

Should any estate, or the name of any grantee or grantees, be placed upon the book at the suggestion of the county attorney or the treasurer of state, in which the papers already on file in the clerk's office do not disclose that an inheritance tax is due or payable, the county attorney shall forthwith give to all parties in interest, such notice as the court or judge may prescribe, requiring them to appear on a day to be fixed by the said court or judge, and show cause why the property should not be appraised and subjected to said tax. If upon hearing at the time so fixed, the court is satisfied that any property of the decedent, or any property devised, granted or donated by him, is subject to the tax, the same proceedings shall be had as in other cases, so far as applicable.

#### RULE 4.

**Appointment of appraisers.** At the first term of court in each county, after the publication of these rules, and annually thereafter, the court shall appoint three competent residents and freeholders of said county, to act as appraisers of all property within its jurisdiction, which is charged or sought to be charged with a collateral inheritance tax. Said appraisers shall serve for one year, and until their successors are appointed and qualified. They shall each take an oath to faithfully and impartially perform the duties of the office, but shall not be required to give bond. They shall be subject to removal at any time at the discretion of the court, and the court, or a judge thereof in vacation, may also, in its discretion, either before or after the appointment of the regular appraisers, appoint other appraisers to act in any given case. Vacancies occurring otherwise than by expiration of term, shall be filled by the appointment of the court, or by a judge in vacation.

#### RULE 5.

**Duties of appraisers.** When an estate is opened in which there is property which may be subject to the inheritance tax, the clerk shall forth-

with issue a commission to the appraisers, who shall fix a time and place for appraisal, and if not practicable to serve the notice provided for by statute, they shall apply to the court or judge for an order as to notice, and upon service of such notice and the making of such appraisal, the said notice, return thereon and appraisal shall be filed with the clerk, and a copy of such appraisal shall be filed by the clerk with the treasurer of state.

Any person interested may, within twenty days thereafter, file objections to said appraisal or taxation, and the same shall then stand for trial and further proceedings as provided by statute. If upon such hearing the court finds that the property is not subject to the tax, the court shall upon expiration of time for appeal, when no appeal has been taken, order the clerk to enter upon the lien book a cancellation of any claim or lien for taxes.

#### RULE 6.

**Duty of county attorney.** It shall be the duty of each county attorney to make examination from time to time of all reports filed with the clerk by administrators, executors, and trustees, pursuant to law or the provisions of these rules; also to make examination of all foreign wills offered for probate or recorded within his county, as well as of the records of deeds and conveyances in the recorder's office of said county, and if from such examination, or from information or knowledge coming to him from any other source, he finds or believes that any property within his county, or within the jurisdiction of the district court of said county, has since July 4, 1896, passed by will or by the intestate laws of this or any other state, or by deed, grant, sale, or gift, made or intended to take effect, in possession or enjoyment after the death of the testator, donor or grantor, to any person other than to or for the use of the father, mother, husband, wife, lineal descendant, adopted child, the lineal descendant of an adopted child of a decedent, or to or for charitable, educational or religious societies, or institutions within this state, he shall make report thereof in writing to the clerk of the district court, embodying in such report, so far as he is able, all the facts mentioned in rule 2 of these rules, and cause the notice required by rule 3 hereof to be properly given and returned.

Any citizen of the state having knowledge of property liable to such tax, against which no proceeding for enforcing collection thereof is pending, may report the same to the county attorney, and it shall be the duty of such officer to investigate the case, and if he has reason to believe the information to be true, he shall forthwith institute such proceedings substantially as above indicated. He shall also advise and assist the clerk and appraisers in the discharge of their duties in cases of this nature, and see that notices required by law and these rules are properly made, served and returned.

#### RULE 7.

**Duty of court.** On the first or second day of each regular term, the court shall require the clerk to present for its inspection, the inheritance tax and lien book hereinbefore provided for, together with all reports of administrators, executors and trustees which have been filed pursuant to these rules, since the last preceding term. The county attorney shall also attend and make report to the court concerning the progress of all cases pending for the collection of such taxes, together with any other facts, which, in his judgment, may aid the court in enforcing the general observance of the collateral inheritance tax law. If from information obtained from the records or reports, or from any other source, the court has reason to believe that there is property within its jurisdiction liable to the payment of an inheritance tax, against which proceedings for collection are not already pending, it shall enter an

order of record, directing the county attorney to institute such proceedings forthwith.

RULE 8.

**Record.** In all cases entered upon the inheritance tax and lien book, the clerk shall make a complete record in the proper probate record, of all the proceedings, orders, reports, inventory, appraisements and all other matters and proceedings therein.

RULE 9.

**Costs.** In all cases where property is found to be liable to taxation under the inheritance tax law, all costs of the proceedings had for the assessment of such tax shall be chargeable to such property, and to discharge the lien upon such property all costs, as well as the taxes, must be paid. In all other cases the costs are to be paid as ordered by the court.

RULE 10.

**Books and blanks.** The book herein provided for, and all blanks to be used in carrying out the provisions of the law and of these rules, shall be in form to be approved by the chief justice of the supreme court, which form shall be furnished to the clerk of each county by the treasurer of state.

It shall be the duty of the state treasurer to give such publicity to these rules, and the provision of the statute regarding the collection of such tax, as may by him be deemed advisable and practicable.

RULE 11.

**Construction.** These rules are not to be construed as in any manner superseding any of the requirements of the statute governing the levy and collection of collateral inheritance taxes, or as relieving executors, administrators, trustees or officers of court, or any of them, from a strict observance of all the duties which such statute imposes upon them.

These rules shall be in full force and effect from and after the 4th day of July, 1898.

BE IT REMEMBERED, that the above and foregoing rules were adopted this 11th day of June, 1898, by the following: H. E. Deemer, chief justice of the supreme court of Iowa; S. M. Weaver, judge of the eleventh judicial district of Iowa; L. E. Fellows, judge of the thirteenth judicial district of Iowa; H. M. Towner, judge of the third judicial district of Iowa; Z. A. Church, judge of the sixteenth judicial district of Iowa; M. J. Wade, judge of the eighth judicial district of Iowa. Said district judges having been appointed by the said chief justice of the supreme court, pursuant to section six, chapter thirty-seven of the acts of the twenty-seventh general assembly of the state of Iowa.

Witness my hand the 11th day of June, 1898.

H. E. DEEMER,

*Chief Justice of the Supreme Court of Iowa.*

Attest: M. J. WADE, *Secretary.*

## TITLE VIII.

### OF ROADS, BRIDGES AND FERRIES, AND THE DESTRUCTION OF THISTLES.

#### CHAPTER 1.

##### OF THE ESTABLISHMENT, ALTERATION AND VACATION OF ROADS.

##### SECTION 1482. Jurisdiction over.

[For earlier annotations, see code, pages 554-6.—Ed.]

**Jurisdiction.** The board of supervisors is without jurisdiction to establish a highway within the limits of an incorporated town. *Philbrick v. University Place*, 106-352.

The action of the board of supervisors in vacating a portion of a highway cannot be questioned by mandamus against a road supervisor to compel him to remove obstructions from the portion of the highway vacated. *Sullivan v. Robbins*, 109-235.

The fact that the board vacates a portion of the highway, so as to leave the remainder less than 40 feet in width is not such of in a collateral proceeding. *Ibid.*

an irregularity as can be taken advantage

The right to the highway vests in the public generally, and but for statutory provisions, giving the board of supervisors power to establish, maintain and discontinue highways, such power would be in the state, which is the representative of the general public. *Dickinson County v. Fouse*, 112-21.

**Dedication.** The execution and filing with the county judge of an instrument giving or offering to give a right of way for a highway which was thereafter abandoned, held sufficient to show a dedication. *Agne v. Seitsinger*, 104-482.

No particular form is necessary for the dedication of land for a highway, the vital question as against the owner being whether the *animus dedicandi* may be inferred from the facts proven; and held that the signature of the owner to a petition to the board of supervisors to lay out a highway was admissible as tending to show an intent to dedicate, although the board of supervisors were without jurisdic-

tion in the matter. *Philbrick v. University Place*, 106-352.

While it is well settled that the dedication of a highway or street must be accepted to be effectual, nevertheless the public or a city or town may be estopped by its conduct to open a street or highway which has been closed or occupied for many years by a private person under a claim of right. *Uptagraff v. Smith*, 106-385.

To establish a highway by prescription there must be a general uninterrupted public use under a claim of right, continued for the statutory period. The mere fact that neighbors and those owning adjoining lands were permitted to use the way for hauling wood and otherwise, is not sufficient to show a dedication to public use. *Fairchild v. Stewart*, 89 N. W., 1075.

Evidence in a particular case held not sufficient to show dedication of a highway. *Fountain v. Keen*, 90 N. W., 82.

**Adverse possession.** Mere non-user will not operate to discontinue a legally established highway unless there has been such long-continued adverse possession or transfer of the land by purchase and sale as that justice demands the public should be estopped from asserting the right to open it up. *Bradley v. Appanoose County*, 106-105.

Where an adjacent owner fenced up the highway, claiming that it had been discontinued by reason of proceedings to relocate, and had exclusive possession by virtue of such acts, continued for ten years, held that the public was barred from asserting any rights thereto. *Rector v. Christy*, 114-471.

##### SEC. 1487. Expediency.

[For earlier annotations, see code, page 557.—Ed.]

Where the opening of a road will require the removal of buildings, the property owner having due notice may waive objection to the opening of the highway

on that ground and claim compensation by way of damages. *Strotsky v. Hickman*, 88 N. W., 825.

**SEC. 1489. Survey made—commissioner sworn.**

[For earlier annotations, see code, page 558.—Ed.]

It is only when the precise location cannot be given otherwise in his report that the commissioner is bound to cause the line thereof to be surveyed and plainly marked. *Palmer v. Clark*, 114-558.

**SEC. 1495. Notice served.**

[For earlier annotations, see code, pages 559-560.—Ed.]

The notice required by this section is for the purpose of giving the owners of land lying or abutting on the road an opportunity to object to the establishment or vacation thereof, or to present their claims for damages. One who has signed a petition asking that action be taken cannot object for want of notice to him. *Sullivan v. Robbins*, 109-235.

Where the property owner has due notice he may interpose the objection that the opening of the highway will necessitate

the removal of buildings, or he may waive that objection and demand compensation by way of damages. *Stronsky v. Hickman* 88 N. W., 825.

A notice to non-residents of the establishment of a highway which is such as might have been authorized by the legislature may be made sufficient by a legalizing act, although not sufficient under the statute in force when it was given. *Fair v. Buss*, 90 N. W., 527.

**SEC. 1501. Final action.**

[For earlier annotations, see code, pages 562-4.—Ed.]

While an alteration of the road may involve the discontinuance of that part which is altered, it will not result in discontinu-

ance of a portion of the old road which is not rendered unnecessary by reason of the change. *Rector v. Christy*, 114-471.

**SEC. 1516. Proceedings in court.**

[For earlier annotations, see code, page 567.—Ed.]

It is only upon a matter of damages that a claimant is entitled to a jury trial in road cases. *In re Bradley*, 108-476.

**SEC. 1518. Lost field notes—resurvey.**

[For earlier annotations, see code, page 568.—Ed.]

.Section applied. *McNamara v. Brehm*, 112-576.

## CHAPTER 2.

## OF WORKING ROADS.

**SECTION 1528. Powers and duties of trustees.** The township trustees of each township shall meet on the first Monday in April, or as soon thereafter as the assessment book is received by the township clerk, and on the first Monday in November, in each year. At the April meeting, said trustees shall determine:

1. The rate of property tax to be levied for the succeeding year for roads, bridges, guideboards, plows, scrapers, tools, and machinery adapted to the construction and repair of roads, and for the payment of any indebtedness previously incurred for road purposes, and levy the same, which shall not be less than one nor more than four mills on the dollar on the amount of the township assessment for that year, which, when collected, shall be expended under the direction and order of the township trustees;

2. The amount that will be allowed for a day's labor done by a man, and by a man and team, on the road. To certify to the board of supervisors the desire for an additional road tax, of not to exceed one mill, to be levied in whole or in part by the board of supervisors as hereinafter provided. At the November meeting, they shall settle with the township clerk and

supervisors of roads. [26 G. A., ch. 43; 25 G. A., ch. 22; C. '73, §§ 969, 971; R., §§ 880, 891, 895; C. '51, § 568.] [29 G. A., ch. 53, § 3.] [29 G. A., ch. 64, § 1.]

[Subdivision two of above section was formerly subdivision three.—Ed.]

[For annotations, see code, page 570.—Ed.]

**SEC. 1530. County road fund—how levied and paid out.** The board of supervisors of each county shall, at the time of levying taxes for other purposes, levy a tax of not more than one mill on the dollar of the assessed value of the taxable property in its county, including all taxable property in cities and incorporated towns, which shall be collected at the same time and in the same manner as other taxes, and be known as the county road fund, and paid out only on the order of the board for work done on the roads of the county in such places as it shall determine; but so much of the county road fund as arises from property within any city or incorporated town shall be expended on the roads or streets within such city or town, or on the roads adjacent thereto, under the direction of the city or town council; and the county treasurer shall receive the same compensation for collecting this tax as he does for collecting corporation taxes. Moneys so collected shall not be transferable to any other fund nor used for any other purpose. The board of supervisors shall levy such an additional sum for the benefit of such townships as shall have certified a desire for such additional levy, as provided for in section fifteen hundred and twenty-eight of this chapter; but the amount for the general township fund and the county road fund shall not exceed in any year five mills on the dollar. [25 G. A., ch. 22; 20 G. A., ch. 200, § 1.] [29 G. A., ch. 65, § 1.]

This section contemplates the levying county, although the tax is not to be of such tax upon property within city limits, expended within the city limits. *Chicago, R. I. & P. R. Co. v. Murphy*, 106-43.

**SEC. 1532-a. Repeal—consolidation of township into one road district.** That section one thousand five hundred and thirty-two (1532) of the code be, and the same is, hereby repealed, and the following enacted as a substitute therefor: The board of township trustees of each civil township in this state, at its regular meeting in April, 1903, shall consolidate said township into one road district, and all road funds belonging to the road districts of said township shall at once become a general township road fund, out of which all claims for work done or material furnished for road purposes prior to the change, and unsettled, shall be paid. [20 G. A., ch. 200, §§ 4, 11.] [29 G. A., ch. 53, § 4.]

[For annotations, see code, page 571 —Ed.]

**SEC. 1533. Duty of trustees.** Where the one road district plan is adopted, the board of township trustees shall order and direct the expenditure of the road funds and labor belonging or owing to the township; may let, by contract, to the lowest responsible, competent bidder, any part or all of the work on the roads for the current year, or may appoint a township superintendent of roads, to oversee, subject to the direction of the board, all or any part of the work, but it shall not incur an indebtedness for such purposes unless the same has been or shall at the time be provided for by an authorized levy; and shall order the township road tax for the succeeding year paid in money and collected by the county treasurer as other taxes. It shall cause both the property and poll road tax to be equitably and judiciously expended for road purposes in the entire road district; shall cause at least seventy-five per cent. of the township road tax locally assessed to be thus expended by the fifteenth day of July in each year; shall cause the noxious weeds growing in the roads to be cut twice a year, when necessary, and at such times as to prevent their seeding, and it may allow any land owner a

reasonable compensation for the destruction thereof, when growing in the roads abutting upon his land. If a superintendent of roads is employed, it shall fix the term of office, which shall not exceed one year, and compensation, which shall not exceed three dollars a day; and no contract shall be made without reserving the right of the board to dispense with his services at its pleasure. [20 G. A., ch. 200. §§ 5-10, 17.] [29 G. A., ch. 53, § 5.] [29 G. A., ch. 64, § 2.]

[For annotations, see code, page 573.—Ed.]

**SEC. 1540-a. Repeal—tax list.** That section one thousand five hundred and forty (1540) of the code, is hereby repealed, and the following enacted as a substitute therefor:

“He shall within four weeks after the trustees have levied the property road tax for the succeeding year, certify said levy to the county auditor, who shall enter it upon the tax books for collection by the county treasurer as other taxes. And he shall, not later than the fifteenth day of April, make out and deliver to the superintendent of roads a list of all persons required to pay road poll tax under the provisions of this act. To enable him to make out such list, the assessor shall furnish the clerk of said township, before the first day of April of each year, a complete copy of the assessment lists of said township for that year, which shall be the basis of such poll tax list. Provided, that the property road tax for the year 1903, shall be levied as heretofore, that it shall be paid in cash and shall be collected by the superintendent of roads appointed by the trustees or the township clerk, as the board of trustees shall determine and direct. Provided, further, that all delinquent road tax for the year 1903, shall be certified to the county auditor by the clerk of each township, for collection as provided by section one thousand five hundred and forty-two (1542) of the code, as amended by this act.” [C. '73, § 973; R., § 892.] [29 G. A., ch. 53, § 6.]

**SEC. 1541-a. Repeal.** That section one thousand five hundred and forty-one (1541) of the code be, and the same is hereby repealed. [29 G. A., ch. 53, § 7.]

**SEC. 1542-a. Repeal—delinquent tax certified.** That section fifteen hundred and forty-two (1542) of the code be repealed and the following enacted in lieu of the same:

Section 1542. He shall, on or before the second Monday of November of each year, make out a certified list of all property, including lands, town lots, personal property and property otherwise assessed, including assessments by the executive council on which the road tax has not been paid in full, and the amount of the tax charged on each separate assessment or parcel of said property, designating the district in which the same is situated and transmit the same to the county auditor, who shall enter the amount of tax on the lists the same as other taxes, and deliver the same to the county treasurer, charging him therewith which shall be collected in the same manner as county taxes are collected. In case the township clerk shall fail or neglect to make such return, he shall forfeit and pay to the township for road purposes a sum equal to the amount of tax on said property, which may be collected by an action on his bond. [29 G. A., ch. 64, § 3.]

[For annotations, see code, page 573.—Ed.]

[Section 1542 was first repealed by 29th G. A. chapter 64, section 3, which act was approved March 25, 1902 and took effect by publication March 27, 1902, while section 8 of chapter 53, acts of the 29th G. A., which took effect July 4, 1902, attempts to amend the original section 1542.—Ed.]

**SEC. 1545. Superintendent—qualification.** Each road superintendent or contractor shall give bond in such sum and with such security as the township clerk may require (but in no case shall a township trustee sign such bond as surety), conditioned that he will faithfully and impartially perform

all the duties required of him, and devote all moneys that may come into his hands by virtue of his office, according to law. [16 G. A., ch. 167; C. '73, §§ 977-8; R., §§ 881, 884.] [29 G. A., ch. 53, § 9.]

[For annotations, see code, page 574.—Ed.]

**SEC. 1546-a. Repeal.** That section one thousand five hundred and forty-six (1546) of the code, is hereby repealed. [29 G. A., ch. 53, § 10.]

**SEC. 1550. Who to perform labor.**

One who works on the highway, under surface water improperly deflected from the direction of the road supervisors, is its natural channel by the improvement not liable, in the absence of trespass, for of the highway. *Mulvihill v. Thompson*, 114-734. any injury to adjoining land occasioned by

**SEC. 1551. Notice of time and place—receipts.** The road supervisor shall give at least three days' notice of the day or days and place to work the roads to all persons subject to work thereon, or who are charged with a road tax within his district, and all persons so notified must meet him at such time and place, with such tools, implements and teams as he may direct, and labor diligently under his direction for eight hours each day; and for such two days' labor the supervisor shall give to him a certificate, which shall be evidence that he has performed such labor on the public roads, and exempt him from performing labor in payment of road poll tax in that or any other road district for the same year. [C. '73, § 984; R., §§ 886, 896; C. '51, § 588.] [29 G. A., ch. 53, § 11.]

[As changed by section 11, chapter 53, twenty-ninth general assembly.—Ed.]

[For annotations, see code, page 575.—Ed.]

**SEC. 1553-a. Repeal.** That section one thousand five hundred and fifty-three (1553) of the code be, and the same is, hereby repealed. [29 G. A., ch. 53, § 12.]

**SEC. 1554. Report.** The superintendent of the township shall report to the township clerk on the first Monday of April and November of each year, which report shall embrace the following items:

1. The names of all persons in his district required to perform labor on the public road, and the amount performed by each;
2. The names of all persons against whom actions have been brought, and the amount collected of each;
3. The names of all persons who have paid their property road tax in labor, and the amount paid by each;
4. The amount of all moneys coming into his hands by virtue of his office, and from what sources;
5. The manner in which moneys coming into his hands have been expended, and the amount, if any, in his possession;
6. The number of days he has been employed in the discharge of his duty;
7. The condition of the roads in his district, and such other items and suggestions as he may wish to make, which report shall be signed and sworn to by him, and filed by the township clerk in his office. [26 G. A., ch. 43; C. '73, § 987; R., § 897; C. '51, § 580.] [29 G. A., ch. 53, § 13.] [29 G. A., ch. 64, § 4.]

[Section 4 of chapter 64 of the 29th G. A., attempts to amend said section, by the insertion of the words "property including" between the words "all" and "lands" in subdivisions five and six as formerly numbered, but which paragraphs had been stricken out by section 13, chapter 53 of the 29th G. A.—Ed.]

**SEC. 1557. Liability for unsafe bridge or highway.**

[For earlier annotations, see code page 577.—Ed.]

A road supervisor is liable for all damages resulting from a defect in the highway allowed to remain after a reasonable time for making repair only where he has had written notice, as required by this section. *Sells v. Dermody*, 114-344.

**SEC. 1560. Obstructions removed.** The road supervisor shall remove all obstructions in the roads, but must not throw down or remove fences which do not directly obstruct travel, until notice in writing, not exceeding six months, has been given to the owner or agent of the land inclosed in part by such fence. [C. '73, § 993; R., § 905; C. '51, § 594.] [28 G. A., ch. 52, § 1.]

[For annotations, see code, page 578.—Ed ]

**SEC. 1561. Condition—guide board.**

[For earlier annotations, see code, page 579.—Ed ]

The road supervisor is individually liable but such liability only attaches after he in damages for neglect in the performance has had the written notice required by Code of the ministerial duty of making repairs, § 1557. *Sells v. Dermody*, 114-344.

**SEC. 1562. Canada thistle—written notice.** The road supervisor, when notified in writing that any Canada thistles or any other variety of thistles are growing upon any lands or lots within his district, shall cause a written notice to be served on the owner, agent, or lessee of such lands or lots, if found within the county, notifying him to destroy said thistles within ten days from the service of said notice, and in case the same are not destroyed within such time, or if such owner, agent, or lessee is not found within the county, then the road supervisor shall cause the same to be destroyed, and make return in writing to the board of supervisors of his county, with a bill for his expenses or charges therefor, which in no case shall exceed two dollars per day for such services, which shall be audited and allowed by said board and paid from the county fund, and the amount so paid shall be entered up and levied against the lands or lots on which said thistles have been destroyed, and collected by the county treasurer the same as other taxes, and returned to the county fund. [24 G. A., ch. 45; C. '73, § 995.] [27 G. A., ch. 39, § 1.]

[Chapter 38 of the acts of the 27th G. A. is repealed; see following section.—Ed.]

**SEC. 1562-a. Repeal—weeds—duty of road superintendent—when** That chapter thirty-eight (38) of the laws of the twenty-seventh general assembly be and the same is hereby repealed, and the following enacted in lieu thereof:

It shall be the duty of road supervisors to cause to be cut, near the surface, all weeds on the public roads in their respective districts between the fifteenth day of July and the fifteenth day of August of each year. But nothing herein shall prevent the land owner from harvesting the grass grown upon the roads along his land in proper season. [28 G. A., ch. 139, § 1.]

**SEC. 1563. Russian thistle—notice.** No owner or occupant of any land or lots, or corporation or association of persons owning, occupying or controlling land as right of way, depot grounds or other purposes, or public officer in charge of any street or road, shall allow to grow to maturity thereon the Russian thistle or salt wort (*salsoli kali*, variety *tragus*). It shall be the duty of every person or corporation so owning, occupying or controlling lands, lots or other real property, or any road supervisor or other public officer having charge of any street or road, to cut, burn or otherwise entirely destroy such thistle growing on said premises, right of way, road or street, before the same shall bloom or come to maturity; and any person, corporation or public officer neglecting to destroy all such thistles as aforesaid, after receiving notice in writing of their presence, shall be deemed guilty of a misdemeanor and be punished accordingly. It shall be the duty of any person knowing of the presence of Russian thistles upon any premises, lands, lots, street, roads or elsewhere, at any time after the first day of July, to give notice immediately to any member of the board of trustees of the township in which thistles are growing; or, if within a city or town, then to give notice to

the mayor, recorder, or clerk thereof; who shall immediately give notice in writing to the owner, occupant, or person or corporation in possession or control thereof; and if not destroyed by such owner or occupant or person in possession in proper time to prevent maturity, cause their total destruction, the costs thereof, together with the costs of serving notice, to be paid out of the county fund upon the certificate of the township trustees or the council, as the case may be, to the board of supervisors; which board shall cause the sum so paid to be levied as a special tax against the premises upon which the thistles are growing, and against the person or corporation owning or occupying the same; which amount shall be collected by the county treasurer as other taxes, and paid into the county fund. Where township trustees have received notice, as aforesaid, of the presence of such thistles upon lands owned by the United States or this state, it shall be their duty to cause their destruction, and the costs thereof, upon proper certificate of the amount, shall be paid out of the county fund. [26 G. A., ch. 78; 25 G. A., ch. 91, §§ 1-3.] [28 G. A., ch. 53, § 1.]

**SEC. 1566-a. Itemized account—duty of trustees.** That the trustees of each township shall take and file with the board of supervisors on or before the first Monday in each year a full and itemized account verified by the township clerk showing each item of expenditures and receipt of all moneys received and disbursed during the preceding year for road purposes in said township, which report shall remain on file with the county auditor, and a copy thereof shall be published in the published report of the proceedings of the January session of the board of supervisors. [29 G. A., ch. 53, § 15.]

**SEC. 1566-b. Meaning of “road supervisors.”** That wherever the term “road supervisors” appears in the code and amendments thereto it shall be held so far as applicable to mean the superintendent or contractor. [29 G. A., ch. 53, § 17.]

[For annotations to section 1567, see code, page 580.—Ed.]

**SEC. 1567-a. Repeal.** That section one thousand five hundred and sixty-seven (1567) of the code be, and the same is, hereby repealed. [29 G. A., ch. 53, § 14.]

**SEC. 1567-b. Repeal—acts in conflict.** That all acts and parts of acts in conflict with the provisions of this act, are hereby repealed. [29 G. A., ch. 53, § 18.]

**SEC. 1569. Turning to right.**

[For earlier annotations, see code, page 581.—Ed.]

This provision is applicable where a person on a bicycle meets a person driving a horse and vehicle. *Cook v. Fogarty*, 103-500.

**SEC. 1570. Trimming hedges.** Owners of osage orange, willow, or any other hedge fence along the public road, unless the same shall be used as a wind-break for orchards or feed lots, shall keep the same trimmed, by cutting back within five feet of the ground at least once in every two years, when so ordered by the trustees of their respective townships, and burn or remove the trimmings so cut from the road.

Upon a failure to comply with the foregoing provision, the road supervisor shall immediately serve notice in writing upon the owner of the hedge to trim the same, and if he fails to do so for sixty days thereafter, such supervisor shall cause the same to be done at a cost not exceeding forty cents per rod, which shall be paid for out of the road fund, and make return thereof to the township clerk, who shall, in certifying the lands upon which the road tax has not been paid, include the lands along which the hedge has been trimmed, together with the amount paid therefor, which shall be collected by the county treasurer in the manner other county taxes are collected.

Where the one district system is adopted as provided in this chapter, it shall be the duty of the township trustees to enforce the foregoing provisions. [26 G. A., ch. 48; 25 G. A., ch. 88, §§ 1, 2; 24 G. A., ch. 40.] [28 G. A., ch. 54, § 1.]

**SEC. 1571. Steam engines on roads—penalty.** Whenever any engine driven in whole or in part by steam power is being propelled upon a public road, or is upon the same, the whistle thereof shall not be blown, and those having it in charge shall stop it one hundred yards distant from any person or persons with horses or other stock in or upon the same, and at a greater distance away if they exhibit fear on account thereof, until they shall have passed it, and a competent person shall be kept one hundred yards in advance of such engine to assist in any emergency arising from frightened animals, and to prevent accidents. In crossing any bridge or culvert in the public road, or plank street-crossing in any city or town, four sound strong planks not less than twelve feet long, each one foot wide and two inches thick, shall be used, by placing and keeping continuously two of them under the wheels. A failure to comply with either of the provisions of this section shall be a misdemeanor, punishable by imprisonment in the county jail not more than thirty days, or by a fine of not more than \$100, and, in addition, all damages sustained may be recovered in a civil action against the violator, and in no case shall the county be liable for damages occurring to any engine or separator. [25 G. A., ch. 21, §§ 1, 2; 24 G. A., ch. 68, §§ 1-4.] [28 G. A., ch. 55, § 1.]

[For annotations, see code, page 581.—Ed.]

## TITLE IX.

### OF CORPORATIONS.

#### CHAPTER 1.

##### OF CORPORATIONS FOR PECUNIARY PROFIT.

##### SECTION 1609. Powers.

[For earlier annotations, see code, pages 587-9.—Ed.]

**Par. 2. Name.** To make notice to a corporation which is named only by the initials of its corporate name sufficient it must appear that at the time such notice was given the corporation was commonly known and customarily referred to by such abbreviations. *Chicago, B. & Q. R. Co. v. Kelley*, 105-106.

**Par. 5. Exemption of property.** The provisions of the articles in a particular case held sufficient to exempt private property of the stockholders in a mutual insurance company from liability for debts of the corporation, although there was a provision by which such property should be liable for money advanced to creating a guaranty fund. *Smith v. Sherman*, 113-601.

Corporations may be legally organized whose articles do not exempt private prop-

erty of its stockholders from liability for corporate debts. *Berkson v. Anderson*, 87 N. W., 402.

**Par. 6. Powers.** The powers given by statute to corporations are not required to be enumerated in its articles, and an omission to claim any such powers in the articles would not leave the corporation without such powers. *Sioux City Terminal R. & W. Co. v. Trust Co.*, 82 Fed., 124.

When the state courts have determined the extent of the powers and liabilities of corporations created under the state law, their decision is conclusive in the federal courts in cases involving no question of general or commercial law and no federal question. *Ibid.*

**Par. 7. By-laws.** By-laws may be binding on a corporation, although informally adopted, if recognized and acted upon by it. *Smith v. Sherman*, 113-601.

**SEC. 1610. Articles adopted and recorded—fees to state.** Before commencing any business except their own organization, they must adopt articles of incorporation, which must be signed and acknowledged by the incorporators, recorded in the office of the recorder of deeds of the county where the principal place of business is to be, in a book kept therefor, and the recorder must, within five days thereafter, indorse thereon the time when the same were filed, and the book and page where the record will be found. Said articles thus indorsed shall then be forwarded to the secretary of state, and be by him recorded in a book kept for that purpose. Such corporation shall pay to the secretary of state, before a certificate of incorporation is issued, a fee of twenty-five dollars, and, for all authorized stock in excess of ten thousand dollars, an additional fee of one dollar per thousand. Should any corporation increase its capital stock, it shall pay a fee to the secretary of state of one dollar for each one thousand dollars of such increase. The recording fee shall be paid in all cases. Farmers' mutual co-operative creamery associations and corporations organized for the manufacture of sugar from beets grown in the state of Iowa, shall be exempt from the payment of the incorporation fee provided herein. [26 G. A., ch. 98; 17 G. A., ch. 23; C. 73, § 1060; R., § 1152; C. '51, § 675.] [27 G. A., ch. 40, §§ 1, 2.] [27 G. A., ch. 41, § 1.] [29 G. A., ch. 66, § 1.]

[For earlier annotations, see code, page 539.—Ed.]

It is not specifically required that the acknowledgment shall be in the same form as that required for conveyances of real

property, and therefore, if the venue is given at the beginning of the certificate, and the officer taking the acknowledgment

subscribes as "notary public," without reciting that he is a notary public in and for the county named, the acknowledg-

ment is sufficient, it being presumed that the officer acts only within the scope of his authority. *Smith v. Sherman*, 113-601.

#### SEC. 1611. Limit of indebtedness.

[For earlier annotations, see code, page 590 —Ed.]

It is doubtful whether an insurance company is required to recite the limit of indebtedness which it may incur by its policies of insurance. At any rate, if the amount of indebtedness is reasonably ascertainable the requirements of the statute have been complied with. *Smith v. Sherman*, 113-601.

A debt contracted in excess of the maximum limitation stated in the charter is not void, but is enforceable against the corporation and parties holding under it, and gives rise only to a right of action on the part of the state because of the violation of statute, and perhaps also a liability on the officers or the corporation for

the excessive debt so contracted. *Sioux City Terminal R. & W. Co. v. Trust Co.*, 173 U. S., 109. S. C. 82 Fed., 124.

A mortgage given by a debtor corporation on its own property is not intended to be governed by the last sentence of this section (embodying a proviso added to § 1061 of the Code of '73 by chap. 22 of 20 G. A.) This sentence applies to the class, and not the condition. It singles out this particular kind of corporation, and it is not meant to point out such a state of affairs which it was thought might exist with any corporation. *Beach v. Wakefield*, 107-567.

**SEC. 1613. Notice published—how—what to contain.** A notice must be published once each week for four weeks in succession in some newspaper as convenient as practicable to the principal place of business, which must contain:

1. The name of the corporation and its principal place of business;
2. The general nature of the business to be transacted;
3. The amount of capital stock authorized, and the times and conditions on which it is to be paid in;
4. The time of the commencement and termination of the corporation;
5. By what officers or persons its affairs are to be conducted, and the times when and manner in which they will be elected;
6. The highest amount of indebtedness to which it is at any time to subject itself;
7. Whether private property is to be exempt from corporate debts.

Proof of such publication, by affidavit of the publisher of the newspaper in which it is made, shall be filed with the secretary of state, and shall be evidence of the fact. [C. '73, §§ 1062-3; R., §§ 1154-5; C. '51, §§ 677-8.] [29 G. A., ch. 67, § 1.]

[For earlier annotations, see code, page 591 —Fd ]

As corporations may be legally organized in whose articles there is no limitation which exempts the individual property of its stockholders, the requirements that the notice make disclosure on this question is

important, and where the publication is in an obscure newspaper, published at a place remote from that of the principal place of business, it is not sufficient. *Berkson v. Anderson*, 87 N. W., 402.

**SEC. 1613-a. Legalizing—defective publication.** That each corporation heretofore incorporated under the laws of the state of Iowa which have [has] caused notice of their [its] incorporation to be published once each week for four consecutive weeks in some daily, semi-weekly or tri-weekly newspaper, instead of causing the same to be published in each issue of such newspaper for four consecutive weeks are hereby legalized and are declared legal incorporations the same as though the law had been complied with in all respects in regard to the publication of notice. [29 G. A., ch. 226, § 1.]

#### SEC. 1615. Change of articles.

[For earlier annotations, see code, pages 591-2.—Ed.]

Where a renewal of the corporate franchise is authorized it may be effected by amendment of the articles as provided

in this section. *Lamb v. Dobson*, 90 N. W., 607.

**SEC. 1616. Individual property liable.**

[For earlier annotations, see code, pages 592-3.—Ed.]

Aside from statute, stockholders of a *de facto* corporation cannot be held liable as partners on account of irregularities, omissions or mistakes in incorporating or organizing the corporation. The statute does not create a contract liability. Therefore, those dealing with a corporation having actual notice of the articles, and after publication of the notice required by statute, cannot hold the stockholders individually liable because of irregularity in the

organization and publication. *Seaton v. Grimm*, 110-145.

Stockholders who participated in the organization of the company and became responsible to the same extent as other stockholders for failure to have notice published, cannot hold such other stockholders liable individually on the ground that there was not a proper publication of notice. *Ibid.*

"Organization and publicity" should be construed "organization or publicity." *Ibid.*

**SEC. 1618. Duration—renewal—certificate and articles to be recorded—fees—notice—proof filed.** Corporations for the construction of any work of internal improvement, or for the transaction of the business of life insurance, may be formed to endure fifty years; those for other purposes, not to exceed twenty years; but in either case they may be renewed from time to time for the same or shorter periods, within three months before or after the time for the termination thereof, if a majority of the votes cast at any regular election, or special election called for that purpose, be in favor of such renewal, and if those wishing such renewal will purchase the stock of those opposed thereto at its real value. Within five days after the said action of the stockholders for the renewal of any corporation, a certificate, showing the proceedings resulting in such renewal, sworn to by the president and secretary of the corporation, or by such other officers as may be designated by the stockholders, together with the articles of incorporation, shall be filed for record in the office of the recorder of the county in which the principal place of business of said corporation is situated, and the same shall be recorded. Upon filing with the secretary of state the said certificate and articles of incorporation, within ten days after they are filed with the recorder, and upon the payment to the secretary of state of a fee of twenty-five (\$25) dollars, and an additional fee of one (\$1) dollar per thousand for all authorized stock in excess of ten thousand (\$10,000) dollars, the secretary of state shall record the said certificate and the said articles of incorporation in a book to be kept by him for that purpose, and shall issue a proper certificate for the renewal of the corporation. Within three months after the filing of the certificate and articles of incorporation with the secretary of state, the corporation so renewed shall publish a notice of renewal. Said notice shall be published for four weeks in succession in a newspaper as convenient as practicable to the principal place of business of the corporation, and proof of publication filed in the office of the secretary of state, and shall contain the matters and things required to be published by section sixteen hundred and thirteen (1613) of the code, relating to original incorporations. [C. '73, § 1069; R., § 1158; C. '51, § 681.] [28 G. A., ch. 56, § 1.] [29 G. A., ch. 66, § 2.]

[For earlier annotations, see code, page 593.—Ed.]

Where a corporation has re-incorporated with the same membership and for the purpose of carrying on the same business, and assuming the obligations of the old company, the new company is liable on the contracts of the old. *Benesh v. Mill Owners' Mut. F. Ins. Co.*, 103-465.

A corporation which took proper steps

for renewal and tendered to the secretary of state the fees required at the time, held not subject to the provisions of the amending statute requiring higher fees in cases of renewal. *Lamb v. Dobson*, 90 N. W., 607.

The renewal of a corporation may be made by an amendment of its articles as provided in Code § 1615. *Ibid.*

**SEC. 1618-a. Fees—since when due.** The fees herein provided shall be due from all corporations applying for a renewal since the first day of January, 1898. [28 G. A., ch. 56, § 2.]

**SEC. 1621. Division of funds.**

[For earlier annotations, see code, page 594.—Ed.]

It is only persons injured by the diversion of funds who are deemed to be defrauded thereby. One who is not a creditor at the time of the diversion is not injured thereby. *Benge v. Eppard*, 110-86.

As to one who is a creditor at the time of the diversion there is no liability if, notwithstanding the diversion, the corporation had sufficient property remaining to pay all debts. *Ibid.*

**SEC. 1624. By-laws posted.**

[For earlier annotations, see code, page 595.—Ed.]

The statutory requirements that the corporation shall keep posted a copy of its by-laws and a statement of the amount of capital stock subscribed and the amount of indebtedness, is primarily for the benefit of the public, to be enforced by mandamus at the suit of a party injured. *Board-*

*man v. Marshalltown Grocery Co.*, 105-445.

By-laws not posted as required by statute are not binding on a stranger without actual notice, but failure to post as required does not constitute a failure to adopt such by-laws. *Fee v. National Masonic Acc. Assn.*, 110-271.

**SEC. 1626. Transfer of shares.**

[For earlier annotations, see code, pages 595-6.—Ed.]

A private individual cannot require that the books of the company be at all times kept open for public inspection. His right to inspect, if any, is personal. Neither can he have an order with reference to future inspection. *Boardman v. Marshalltown Grocery Co.*, 105-445.

mandamus to compel the proper issuance or transfer. *Hair v. Burnell*, 106-280.

So long as the stock stands on the books in the name of the judgment debtor it can be levied on and sold, although the creditor has actual notice of a transfer thereof by the debtor. *Ibid.*

A transfer of stock not made upon the books of the company as required by statute will not be effectual as against an attachment of such stock for debts of the person who appears from the books to be the owner. Knowledge on the part of the attaching creditor or the officer of the transfer of the stock will not defeat the lien of the attachment. *Ottumwa Screen Co. v. Stodghill*, 103-437. *Perkins v. Lyons*, 111-192.

These provisions relate to corporations organized under the laws of the state and doing business in the state, and the books referred to are required to be kept within the state where they can be inspected. *Perkins v. Lyons*, 111-192.

In a particular case held that a pencil notation on the stub of the stock book, made long prior to a levy on the stock, although not dated, was sufficient to constitute a transfer. *Ibid.*

A person who is entitled to have shares of stock issued to him, or to have stock owned by him transferred on the books of the company, may maintain an action of

The provisions of this section relating to transfer of stock as collateral security held not to be retroactive. *Ibid.*

**SEC. 1627. Amount paid in.** No certificate or shares of stock shall be issued, delivered or transferred by any corporation, officer or agent thereof, or by the owner of such certificate or shares, without having indorsed on the face thereof what amount or portion of the par value has been paid to the corporation issuing the same, and whether such payment has been in money or property. Any person violating the provisions of this section, or knowingly making a false statement on such certificate, shall be fined not less than one hundred dollars nor more than five hundred dollars, and shall stand committed to the county jail until such fine and costs are paid. This section shall not apply to railway or quasi public corporations organized before the first day of October, 1897. [28 G. A., ch. 57, § 1.]

**SEC. 1629. Expiration.**

[For earlier annotations, see code, page 597.—Ed.]

The fact that the charter of the corporation has expired will not show that it cannot be the owner of property. After the expiration of the term of the charter the corporation continues to live for the purpose of discharging its obligations and dis-

posing of its property. *State v. Fogarty*, 105-32.

It is only corporations whose charters expire by limitation, or the voluntary act of the stockholders, which continue for the purpose of winding up their affairs.

Corporations dissolved by action of court have no further legal existence, and cannot be represented by officers or agents. *State v. Fidelity L. & T. Co.*, 113-439.

A court of equity may wind up the affairs of a corporation whose charter has expired, if internal dissensions in the corporation make it necessary. This section

only authorizes continuance of the business by the corporation managers for the amicable settlement of its affairs. But a corporation whose charter has not expired will not be dissolved at the suit of a stockholder, and it is error to direct a sale of its property in such suit. *Stewart v. Pierce*, 89 N. W., 234.

### SEC. 1631. Liability of stockholders.

[For earlier annotations, see code, pages 597-9.—Ed.]

Although a certificate of stock recites that it is fully paid yet if it expressly declares that it is subject to assessment for purposes named such an assessment will be valid and can be enforced against the holder of the stock. *Western Imp. Co. v. Des Moines Nat. Bank*, 103-455.

Such stock is not fully paid up stock and the holder thereof is individually liable under statutory provisions, even if the articles of incorporation provide otherwise. *Ibid.*

The corporation may maintain an action against the stockholder for an assessment lawfully made and it is not necessary that it shall appear that the corporation is insolvent. *Ibid.*

Where a call for an assessment on stock does not specify the time, place or person to whom payment is to be made it will be presumed that the assessment is payable on demand at the place of business of the corporation and to the officer authorized to receive money due to it. *Ibid.*

When property is received by the corporation in payment of stock at an excessive valuation it is to be considered as constituting payment only to the extent of its real value and the owners of such stock are liable to creditors for the difference between the actual value of the property and the face value of the stock. *Stout v. Hubbell*, 104-499.

It is immaterial that the articles of incorporation show that certain shares of stock have been issued as fully paid up in exchange for property. Creditors have a right to presume in such case that the property received is of the actual value of the face of the stock, and if it is of less value the holder of such stock is liable to the creditors for the difference. *Ibid.*

Property may be accepted in exchange for stock, providing it is taken at its true value. The parties have the right in good faith to agree on the value of the property taken, but this should not be specula-

tive or fictitious. *State Trust Co. v. Turner et al.*, 112-664.

But a creditor of the corporation, who has become such with knowledge that stock, although issued as fully paid, has not in fact been paid for, cannot enforce his claim against the holders of such stock, nor can his assignee do so. *Ibid.*

The stockholder after the transfer of his stock remains liable for indebtedness of the corporation existing at the time of such transfer. *White v. Green*, 105-176. *White v. Marquardt*, 105-145.

One who in fact becomes a holder of stock incurs the liability of a stockholder for unpaid installments, although the transfer of the stock to him is not recorded in the books of the company; and upon a subsequent transfer of the stock by him effected by means of a transfer at his instance directly from the original holder to the last purchaser, he nevertheless remains liable in the same way that other holders of stock remain liable after transfer for liabilities of the corporation existing at the time of such transfer. *White v. Marquardt*, 105-145.

Indebtedness of the corporation not matured at the time of the transfer of stock is nevertheless a liability for which the stockholder remains liable to the extent of the unpaid installments of his stock. *White v. Greene*, 105-176.

In a proceeding by the auditor of state to wind up a bank and distribute its assets among the creditors, the receiver may have an order for the assessment of stockholders based on an estimate of the amount for which they will be liable under the statutory provision for double liability, and the stockholders may be compelled to pay such assessment before the assets of the bank are distributed, subject to the right to a return of any assets left undisposed of after the debts are all paid. *State ex rel. v. Union Stock Yards State Bank*, 103-549.

### SEC. 1633. Indemnity—contribution.

A stockholder who has been compelled to pay more than his just proportion of unpaid subscriptions to the capital stock may enforce contribution from the other stockholders who have not paid their just proportion, and this rule is applicable to a case where a stockholder has voluntarily paid more than his just proportion, but

liability in this respect may be determined by the contract between the parties, and if the stockholders pays creditors, knowing that the other stockholders have an agreement by which their stock is to be treated as fully paid up, he cannot recover against them for contribution. *Esgen v. Smith*, 113-25.

**SEC. 1637. Foreign corporation—filing articles—process.**

It is within the power of the state to prescribe the method by which corporations doing business within its jurisdiction may be brought into court and to designate the officer or agent of such corporation upon whom the process necessary to commence an action may be served. *Green v. Equitable Mut. L. & End. Assn.*, 105-628.

The permit here required is not neces-

sary to enable a foreign corporation to purchase property in this state and transport the same through the state. *Ware Cattle Co. v. Anderson*, 107-231.

The fact that statutory requirements as to foreign corporations have not been complied with by the corporation cannot be taken advantage of by one who has received the benefits of a contract with such corporation. *Spinney v. Miller*, 114-210.

**SEC. 1640. Dissolution—receiver.**

From the time of entry of dissolution by the court in a proper case the corporation is dead, and cannot be represented by officers or agents. Therefore held that where the decree contained an order or dissolu-

tion, the corporation, without appealing from that portion of the decree could not ask relief with reference to other orders in the same decree. *State v. Fidelity L. & T. Co.*, 113-439.

## CHAPTER 2.

## OF CORPORATIONS NOT FOR PECUNIARY PROFIT.

**SECTION 1642. Organization—purpose—name.**

[For earlier annotations, see code, page 602.—Ed.]

The secular acts of religious corporations are to be governed by the same principles of law as those applied to civil corporations. *Moore v. First etc. Methodist Church*, 90 N. W., 492.

The law presumes that meetings of trustees of a religious corporation are regular and upon proper notice and that contracts made by them and under which they have accepted benefits are binding. *Ibid.*

## CHAPTER 3.

## OF DEPARTMENT OF AGRICULTURE, AGRICULTURAL AND HORTICULTURAL SOCIETIES AND STOCKBREEDERS' ASSOCIATIONS AND STATE DAIRY ASSOCIATIONS.

**SECTION 1657-a. Repeal.** That section sixteen hundred and fifty-three (1653), sixteen hundred and fifty-four (1654), sixteen hundred and fifty-five (1655), sixteen hundred and fifty-six (1656), sixteen hundred and fifty-seven (1657), sixteen hundred and seventy-four (1674), sixteen hundred and eighty-two (1682) and sixteen hundred and eighty-three (1683) of the code, and chapter forty-two (42) of the acts of the twenty-seventh general assembly, be and the same are hereby repealed. [28 G. A., ch. 58, § 18.]

**SEC. 1657-b. Department of agriculture.** For the promotion of agriculture, horticulture, forestry, animal industry, manufactures, and the domestic arts, there is hereby established a department to be known as the "department of agriculture," which shall embrace the district and county agricultural societies organized or to be organized under existing statutes and entitled to receive aid from the state, the state weather and crop service, and the offices of the dairy commissioner and state veterinarian. [28 G. A., ch. 58, § 1.]

**SEC. 1657-c. State board of agriculture.** The department shall be managed by a board, to be styled "the state board of agriculture," of which the governor of the state, the president of the state college of agriculture and mechanic arts, the state dairy commissioner, and the state veterinarian shall be members *ex officio*. The other members of the board shall consist of a president, vice-president, secretary, treasurer and one director from each

congressional district, to be chosen as hereinafter provided. [28 G. A., ch. 58, § 2.]

**SEC. 1657-d. Agricultural convention.** There shall be held at the capitol on the second Wednesday of December 1900, and annually thereafter, a state agricultural convention, composed of the state board of agriculture, together with the president or secretary of each county or district society entitled to receive aid from the state, or a regularly elected delegate therefrom accredited in writing, who shall be a resident of the county; and in counties where there are no agricultural societies the board of supervisors may appoint a delegate who shall be a resident of the county. The president or an accredited representative of the following named associations shall be entitled to membership in the said convention, to wit: the state horticultural society, the state dairy association, the improved stock breeders' association, the swine breeders' association, and each farmers' institute organized under the provisions of section sixteen hundred and seventy-five (1675) of the code. Provided, said farmers' institute has been organized at least one (1) year, and has reported to the state secretary of agriculture, not later than November first, through its president and secretary or executive committee, that an institute was held according to law, the date thereof, the names and post-office address of its officers. They shall also furnish the state secretary of agriculture with a copy of program of each institute hereafter held and one or more papers read before such institute, if papers are read. No proxy given by any delegate elected by a farmers' institute shall be recognized by said convention. [28 G. A., ch. 58, § 3.] [29 G. A., ch. 165, § 1.]

**SEC. 1657-e. Officers—directors—vacancies.** At the convention held on the second Wednesday in December 1900, there shall be elected a president and vice-president for the term of one year; also one director of the board of agriculture from each congressional district; those from even numbered districts to serve two years and those from odd numbered districts one year. At subsequent annual conventions, vacancies in the list of district directors shall be filled for two years. But vacancies occurring from death or other causes, shall be filled for the unexpired term; and the board may fill any vacancy in office until the next annual convention. [28 G. A., ch. 58, § 4.]

**SEC. 1657-f. State farmers' institute.** In connection with the annual convention, either preceding or following the day on which the officers are elected, the board may hold a state farmers' institute, for the discussion of practical and scientific topics relating to the various branches of agriculture, the substance of which shall be published in the annual report of the board. [28 G. A., ch. 58, § 5.]

**SEC. 1657-g. Duties of board.** The board shall have general supervision of the several branches, bureaus and offices embraced in the department of agriculture; and it shall be the duty of the board to look after and promote the interests of agriculture, of agricultural education and animal and other industries throughout the state; to investigate all subjects relating to the improvement of methods, appliances and machinery, and the diversification of crops and products; also to investigate reports of the prevalence of contagious diseases among domestic animals, or destructive insects and fungus diseases in grains, and grasses, and other plants, the adulteration of foods, seeds and other products, and to report the result of investigation, together with recommendations of remedial measures for prevention of damage resulting therefrom. It shall be the duty of the Iowa agricultural experiment station to co-operate with the department of agriculture in carrying on these investigations. [28 G. A., ch. 58, § 6.]

**SEC. 1657-h. Executive committee.** The president, vice-president, and secretary shall constitute an executive committee, which shall transact such business as may be delegated to it by the board of agriculture. The

president may call meetings of the board when the interests of the department require it. [28 G. A., ch. 58, § 7.]

**SEC. 1657-i. State fair.** The board shall have full control of the state fair grounds and improvements thereon belonging to the state, with requisite powers to hold annual fairs and exhibits of the productive resources and industries of the state. They may prescribe all necessary rules and regulations thereon. The board may delegate the management of the state fair to the executive committee and two or more additional members of the board; and for the special work pertaining to the fair they may employ an assistant secretary and such clerical assistance as may be deemed necessary. All expenditures connected with the fair including the per diem and expenses of the managers thereof, shall be recorded separately and paid from the state fair receipts. The said board of agriculture shall have the power to authorize or forbid the construction of street railways within the state fair grounds and may define the motive power by which the cars thereon shall be propelled and to authorize or forbid the location and laying down of tracks for street railways in said grounds. [28 G. A., ch. 58, § 8.] [29 G. A., ch. 166, § 1.]

**SEC. 1657-j. Duty of officers as to bequests.** The department of agriculture is hereby authorized to take and hold property, real and personal, derived by gifts and bequests, and the president, secretary and treasurer shall have charge and control of the same, subject to the action of the board, and shall give bonds as required in case of executors, to be approved by the board of agriculture and filed with the secretary of state. [28 G. A., ch. 58, § 9.]

**SEC. 1657-k. Secretary—duties—Iowa Year Book of Agriculture.** The board shall elect a secretary for a term of one year, whose duties shall be such as usually pertain to the office of a secretary, under the direction of the board. He shall keep a complete record of the proceedings of the annual state agricultural convention and all the meetings of the board; he shall draw all warrants on the treasurer and keep a correct account thereof; he shall compile and superintend the printing of the annual report of the state department of agriculture, which shall be entitled "The Iowa Year Book of Agriculture," and shall include the annual report of the dairy commissioner, the state dairy association, and the Iowa agricultural experiment station, the annual report of the state veterinarian, the Iowa weather and crop service, the Iowa improved stock breeders' association, or such part thereof as the executive committee may approve, and such other reports and statistics as the board may direct, which shall be published by the state; he shall perform such other duties as the board may direct. [28 G. A., ch. 58, § 10.]

**SEC. 1657-l. Distribution of year book—competitive bids.** The Iowa Year Book of Agriculture shall be printed and bound in cloth and such number as the executive council shall direct, to be distributed as follows: One copy to each state officer and member of the general assembly; ten copies to the state library and ten copies to the libraries of the state university and the state college of agriculture and mechanic arts; one copy to each library in the state open to the general public; one copy to the president and secretary of each county and district agricultural society, and one copy to the board of supervisors of each county in which there is no such agricultural society, and the balance as may be directed by the board of agriculture. The executive council shall receive competitive bids for the printing and binding of the year book and let the contract to the lowest responsible bidder. Such bidding, however, shall be confined to concerns in Iowa and to persons or corporations paying the union scale of wages. [28 G. A., ch. 58, § 11.]

**SEC. 1657-m. Present officers and directors.** The present officers and directors of the state agricultural society, upon taking effect of this act, shall be, and they are hereby made and constituted officers and directors of the

department of agriculture, who, with the *ex officio* members named in section two (2) hereof, shall have full control and management of the department of agriculture until the members of the state board of agriculture are elected as provided in section three (3) of this act. [28 G. A., ch. 58, § 12.]

**SEC. 1657-n. Office—supplies—salary of secretary and assistant.** The office of the department of agriculture shall be in rooms numbers eleven (11) and twelve (12), in the capitol building; the said office shall be entitled to such supplies, stationery, postage and express as may be required, which shall be furnished by the executive council in the same manner as other officers are supplied. The salary of the secretary shall not exceed fifteen hundred dollars (\$1500) per annum; and when the board deem it necessary it may employ an assistant at an expense of not more than seventy-five dollars (\$75) per month. [28 G. A., ch. 58, § 13.]

**SEC. 1657-o. Treasurer—duties—bond—compensation.** The board shall elect a treasurer for a term of one year, whose duties shall be to keep a correct account of the receipts and disbursements of all moneys belonging to the department of agriculture, and shall make payments only on warrants signed by the president and secretary thereof, except in payment of premiums. He shall execute a bond for the faithful performance of his duty, to be approved by the board and filed with the secretary, and shall receive such compensation for his services as shall be fixed by the board, not exceeding one hundred dollars per annum. [28 G. A., ch. 58, § 14.]

**SEC. 1657-p. Compensation of elective members.** The elective members of the state board of agriculture, for attending the meetings of the board, and for the special work pertaining to the holding of the state fair shall be allowed four dollars (\$4) per day and five cents per mile in going and returning from the place where the business is transacted, the claim for which shall in all cases be verified and paid as provided in section eight (8). [28 G. A., ch. 58, § 15.]

**SEC. 1657-q. Finance committee—report—compensation.** A finance committee consisting of three members shall be appointed by the executive council, whose duty it shall be to examine and report upon all financial business of the department of agriculture prior to the annual convention thereof, and make their report to the governor. No member of such committee shall be a member of the board. A reasonable compensation, not exceeding four dollars to each member for each day actually and necessarily engaged in the performance of their duties and necessary expenses incurred, shall be allowed said finance committee, to be audited by the executive council and paid out of any funds in the state treasury not otherwise appropriated. Such report shall be edited under the direction of the executive council and be published in accordance with the provisions of section one hundred and sixty-three (163) of the code and acts amendatory thereof. [28 G. A., ch. 58, § 16.]

**SEC. 1657-r. Premium list and rules.** The premium list and rules of exhibition shall be determined and published by the board prior to the first day of April in each year. [28 G. A., ch. 58, § 17.]

**SEC. 1657-s. Corrective.** That where the words "board of directors of the state agricultural society" occur in the code or the acts amendatory thereto, the same shall be construed to mean and to refer to the state board of agriculture; and the words "state society" and "state agricultural society" shall be construed to mean and refer to the department of agriculture. [28 G. A., ch. 58, § 20.]

**SEC. 1657-t. Amounts appropriated.** There is hereby appropriated annually from and after the first day of January nineteen hundred and one (1901) for the support of the office of the department of agriculture, twenty-four hundred dollars (\$2400) and for insurance and improvements of buildings on the state fair grounds the sum of one thousand dollars (\$1,000) or so much thereof as shall be necessary, and the auditor of state shall draw

a warrant therefor upon the order of the department of agriculture signed by the president and secretary thereof, in such sums and at such times as the board shall deem necessary. The state shall not be liable for the payment of any premiums offered by the state board of agriculture, nor for any expenses or liabilities incurred by said board, except, as expressly provided for in this act. [28 G. A., ch. 58, § 21.]

**SEC. 1658. County societies—premiums.** County and district agricultural societies may annually offer and award premiums for the improvement of stock, tillage, crops, implements, mechanical fabrics, articles of domestic industry, and such other articles and improvements as they may think proper, and so regulate the amount thereof and the different grades as to induce general competition. [C. '73, § 1109; R., § 1697.] [28 G. A., ch. 59, § 2.]

[For annotations, see code, page 605.—Ed.]

**SEC. 1659. List of awards.** Each county and district society shall annually publish a list of the awards, and an abstract of the treasurer's account, in one or more newspapers of the county, with a report of its proceedings during the year, and a synopsis of the awards. It shall also make a report of the condition of agriculture in the county to the board of directors of the state agricultural society, which shall be forwarded on or before the first day of November in each year to the secretary of said society. The auditor of state, before issuing a warrant in favor of such societies for any amount, shall demand the certificate of the secretary of the state society that such report has been made. Any society failing to report on or before the first day of November shall not receive state aid for that year. [C. '73, § 1110; R., § 1698.] [28 G. A., ch. 59, § 2.]

[For annotations, see code, page 605.—Ed.]

**SEC. 1661-a. Repeal—state aid to district or county society—failure to report.** That section sixteen hundred sixty-one (1661) of the code be and is hereby repealed and the following enacted in lieu thereof:

Any county or district agricultural society, upon filing with the auditor of state affidavits of its president, secretary, and treasurer showing what sum has actually been paid out during the current year for premiums, not including races, or money paid to secure games or other amusements, and that no gambling devices or other violations of law were permitted, together with a certificate from the secretary of the state society showing that it has reported according to law, shall be entitled to receive from the state treasury a sum equal to forty per cent. of the amount so paid in premiums, but in no case shall the amount paid to any society exceed the sum of two hundred dollars. When any society fails to report, according to law, on or before the first day of November, that society shall not receive a warrant from the state auditor for that year, but the secretary of the state board of agriculture shall notify the county auditor of the county in which the society is located of such failure, and the board of supervisors may appoint a delegate to the annual meeting or state agriculture [agricultural] convention, said delegate to be a resident of said county. [27 G. A., ch. 43, § 1.] [28 G. A., ch. 59, § 1.]

[For annotations to original section, see code, page 605.—Ed.]

**SEC. 1672. Printing and distribution.** There shall be printed four thousand copies of the report, which shall be bound in muslin covers, uniform in style with the reports heretofore made, which shall be distributed by the secretary of state, as follows: Six copies each to the governor, lieutenant-governor, secretary of state, auditor, treasurer, attorney-general, judges of the supreme court, and each member of the general assembly; one hundred to the agricultural college, five copies to the university, two to each incorporated college in the state, one to each auditor, and clerk of the district court,

to be kept in his office, and one to each newspaper published in the state; the remainder to be distributed by direction of the society. [18 G. A., ch. 6; C. '73, § 1120.] [29 G. A., ch. 68, § 1.]

**SEC. 1673. Appropriation for.** The sum of four thousand dollars is hereby appropriated annually for the use and benefit of said society, which shall be paid upon the warrant of the auditor of state, upon the order of the president of said society, in such sums and at such times as may be for the interests of said society. [20 G. A., ch. 128; C. '73, § 1121.] [29 G. A., ch. 68, § 2.]

**SEC. 1675. Farmers' institutes—state aid—appropriation.** When forty or more farmers of a county organize a farmers' county institute, with a president, secretary, treasurer, and an executive committee of not less than three outside of such officers, and hold an institute, remaining in session not less than two days in each year, which institute may be adjourned from time to time and place to place in said county, the county auditor, upon proof of such organization and such institute having been held, together with an itemized statement, showing the manner in which the money herein appropriated has been expended, shall certify the same to the auditor of state, who shall remit to the treasurer of such county his warrant for not to exceed seventy-five dollars, and there is hereby appropriated, out of the moneys in the state treasury not otherwise appropriated, a sum not to exceed seventy-five dollars annually for such institute work in each county. No officer of any such farmers' institute shall receive, directly or indirectly, any compensation from said state fund for services as such officer. [24 G. A., ch. 58, § 1.] [29 G. A., ch. 69, § 1.]

**SEC. 1679. Stations—bulletins.** The director shall cooperate with the board of directors of the state agricultural society to establish volunteer stations at one or more places in each county in the state, and in appointing observers thereat; to supervise such stations, receive reports of meteorological events and crop conditions therefrom, and tabulate the same for permanent record; to issue weekly weather and crop bulletins during the season from April first to October first, and to edit and cause to be published at the office of the state printer a monthly weather and crop review, containing meteorological and agricultural matter of public interest and educational value. The state printer shall print three thousand copies thereof, which shall be distributed from the office of department of agriculture. The directors may require a larger issue for such subscribers as will pay the expense thereof. The director shall have advisory power to cooperate with the farmers' institute organizations of the several counties of the state, for the purpose of arranging dates and providing speakers or lecturers, with a view to economy of time and travel in attending institutes; such institutes to be held as nearly as practicable in circuits, and at such dates as will enable speakers to attend two or more such institutes each week. [24 G. A., ch. 63, § 2; 23 G. A., ch. 29, § 4.] [28 G. A., ch. 58, § 19.]

**SEC. 1681. Appropriation.** There is hereby appropriated, out of any money in the state treasury not otherwise appropriated, the sum of two thousand seven hundred dollars annually, to be drawn and expended upon the order of the president and secretary of the department of agriculture, for such service, including the salary of the director, which shall not exceed fifteen hundred dollars per annum. [24 G. A., ch. 63, § 1.] [28 G. A., ch. 58, § 19.]

## CHAPTER 4.

## OF INSURANCE OTHER THAN LIFE.

**SECTION 1689. Kind of company.**

The provisions as to mutual benefit associations are distinct from those for the incorporation of mutual companies, and the statutory requirement that the word "mutual" shall be included in the name of the company organized under the latter provisions has no application to such a society. *Moore v. Union Fraternal Acc. Assn.*, 103-424.

**SEC. 1690. Stock or mutual.**

[For earlier annotations, see code, page 610.—Ed.]

A mutual company cannot issue policies upon the stock plan, and such policies, if issued, are illegal and void. *Smith v. Sherman*, 113-601.

**SEC. 1698. Secretary and other officers—by-laws—records.**

[For earlier annotations, see code, page 611.—Ed.]

By-laws duly adopted, but not posted as required by law, are valid and controlling as to all persons informed of their existence, the posting being required for the sole purpose of imparting constructive notice, and if the existence of the by-laws is expressly recognized, the person who receives such certificate is bound thereby. *Fee v. National Masonic Acc. Assn.*, 110-271.

While members of a mutual company may be bound by by-laws adopted after they become members, nevertheless the terms of a policy of insurance will be presumed to be governed by the by-laws in force when it is issued, and not to be affected by those subsequently adopted. *Farmers' Mut. Hail Ins. Assn. v. Slattery*, 88 N. W., 949.

**SEC. 1709. Kinds of insurance—limitation of risk.** Any company organized under this chapter or authorized to do business in this state may:

1. Insure houses, buildings and all other kinds of property against loss or damage by fire or other casualty, and make all kinds of insurance on goods, merchandise or other property in the course of transportation, whether on land or water, or any vessel or boat wherever the same may be;
2. Insure the fidelity of persons holding places of private or public trust, or execute as surety any bond or other obligation required or permitted by law to be made, given or filed, except bonds required in criminal causes. None but stock companies shall engage in fidelity and surety business;
3. Insure the safe keeping of books, papers, moneys, stocks, bonds and all kinds of personal property, and receive them on deposit;
4. Insure horses, cattle and other live stock against loss or damage by accident, theft or any unknown or contingent event which may be the subject of legal insurance;
5. Insure the health of persons and against personal injuries, disablement or death resulting from traveling or general accidents by land or water, and insure employers against loss in consequence of accidents or casualties of any kind to employes or other persons, or to property resulting from any act of an employe, or any accident or casualty to persons or property, or both, occurring in or connected with the transaction of their business, or from the operation of any machinery connected therewith, except such insurance as is provided for in the next paragraph;
6. Insure against loss or injury to person or property, or both, growing out of explosion or rupture of steam boilers;
7. Any insurance company organized and incorporated on the stock or mutual plan may insure against loss or damage resulting from burglary or robbery, or attempt thereat, and against the loss of moneys and securities in the course of transportation. A mutual company organized under this subdivision shall not issue any policy to any person, firm, or corporation other

than banks, bankers, loan companies, trust companies, and county treasurers. Provided, also, that companies organized to transact business as provided by this subdivision seven (7) may hold their annual meetings in the month of July, instead of January;

8. Insure or guarantee and indemnify merchants, traders and those engaged in business and giving credit from loss and damage by reason of giving and extending credit to their customers and those dealing with them, which business shall be known as credit insurance. [25 G. A., ch. 32; 24 G. A., ch. 29; C. '73, § 1132.] [28 G. A., ch. 60, § 1.] [29 G. A., ch. 70, § 1.] [29 G. A., ch. 71, § 1.]

[For annotations, see code, page 614.—Ed.]

**SEC. 1710. Kind of risk—casualty risks—limitation.** No company organized by either of the methods provided in this chapter or authorized to do business in the state shall issue policies of insurance for more than one of the six purposes mentioned in the preceding section, or expose itself to loss on any one risk or hazard to an amount exceeding ten per cent. of its paid up capital, unless the excess shall be reinsured in some other good and reliable company. Provided, however, that any life insurance company organized on the stock or mutual plan and authorized by its charter or articles of incorporation so to do, may upon complying with the provisions of this chapter, in addition to such life insurance, insure against all of the casualties specified in sub-division 5 of section seventeen hundred and nine (1709) of the code. Provided further, however, that any stock company now or hereafter authorized under the laws of this state to transact the business described in division two (2) of section seventeen hundred and nine (1709) of the code shall, in addition to such insurance also be authorized to insure against loss or damage resulting from theft, larceny, burglary, robbery or attempt thereof, and against the loss of moneys or securities in the course of transportation. The restrictions as to the amount of risk a company may assume shall not apply to companies organized to guarantee the fidelity of persons in places of public or private trust, nor to companies that receive on deposit and guarantee the safe keeping of books, papers, moneys and other personal property. [C. '73, § 1132.] [28 G. A., ch. 61, § 1.] [29 G. A., ch. 72, § 1.]

**SEC. 1720-a. Repeal—auditor's report.** That section seventeen hundred twenty (1720) of the code be repealed, and the following enacted in lieu thereof:

“He shall cause the information contained in the statements required of the companies organized or doing business in the state to be arranged in detail, and prepare the same for printing, which report shall be made to the governor on or before the first day of May of each year.” [28 G. A., ch. 62, § 1.]

**SEC. 1722. Service of process.**

[For earlier annotations, see code, page 618.—Ed.]

It is the written consent of the corporation, and not the statute itself, which confers on the auditor power to acknowledge service. *Greaves v. Posner*, 112-651.

**SEC. 1724. Certificate.**

The power to exclude foreign corporations includes the right to preclude such corporations from continuing in business without complying with the provisions imposed by statute. *Manchester Ins. Co. v. Herriott*, 91 Fed., 711.

**SEC. 1727. Forfeiture of policies.**

[For earlier annotations, see code, page 619.—Ed.]

The provisions of 18 G. A., chap. 210, as to notice of forfeiture for non-payment of premium note had no application to a forfeiture of membership in a mutual association for failure to pay assessments. *Beeman v. Farmers' Pioneer Mut. Ins. Assn.*, 104-83.

This section was designed to give to the assured at least 30 days from the mailing of the notice in which to make the payment to which the notice refers, and the time cannot be shortened by a direction on the envelope containing the notice that it shall be returned if not delivered within 15 days. *Smith v. Continental Ins. Co.*, 108-382.

Where such notice treats two policies as one, although they are separate and distinct, it should specify the amount re-

quired to cancel each policy, and also the amount of the premium about to become due on account thereof. *Ibid. Born v. Home Ins. Co.*, 110-379.

Forfeitures are not favored, and the provisions of this section are mandatory, and must be strictly followed. *McDonald v. Mut. Ins. Co.*, 89 N. W., 1091.

Error in stating the amount of the short rate, as fixed by the auditor under the provisions of Code § 1729, will defeat the forfeiture. *Ibid.*

### SEC. 1728. Cancellation of policy.

[For earlier annotations, see code, page 619.—Ed.]

An association purporting to be organized under the provisions of § 1160 of the Code of 1873, but in fact exacting premium notes instead of assessments from its members, thereby subjected itself to the

requirements of 18 G. A., chap. 210 (Code § 1727), as to giving notice of forfeiture on account of non-payment of such notes. *Bradford v. Mut. Ins. Co.*, 112-495.

### SEC. 1741. Copy of application.

[For earlier annotations, see code, pages 622-3.—Ed.]

The fact that the application is not embodied in or attached to the policy does not preclude proof of the terms of the application in a suit by the insured against members and officers of a mutual benefit association to compel the payment of the assessment, where such evidence is sought to be introduced for the purpose of showing that the assured knew that the company was conducted on the assessment plan. *Moore v. Union Fraternal Acc. Assn.*, 103-424.

The purpose of the statutory provisions under which it is necessary to set the application out in or attach it to the policy is, that when the application is made a part of the contract a true copy must be attached to the policy, so that the writings composing the contract may all appear together and that the insured may be in possession of the evidence of what his contract is. Therefore, held, that the statute contemplates more than a mere substantial copy of the application and yet not a true likeness or facsimile. The copy must be so exact and accurate as that upon comparison it can be said to be a true copy without resorting to construction. *Johnson v. Des Moines L. Assn.*, 105-273.

Where a copy of an application attached to or incorporated in the policy is defective and incomplete, the company is precluded from proving the falsity of the representations in the application as a defense to an action on the policy. *Corson v. Anchor Mut. F. Ins. Co.*, 113-641.

Where the copy of an application attached to the policy is totally defective and insufficient, the company cannot show misrepresentations or breach of conditions contained in such application. *Corson v. Iowa Mut. Fire Ins. Assn.*, 88 N. W., 1086.

The provisions of this section are appli-

cable to mutual companies, notwithstanding the provisions of Code § 1759. *Ibid.*

A premium note, non-payment of which will by the terms of the application render the policy void, must be set out as a part of the application under the provisions of this section. (Following *Lewis v. Burlington Ins. Co.*, 71-97; s. c. 80-259.) *Summers v. Des Moines Ins. Co.*, 88 N. W., 326.

The examiners' report on an application for life insurance is not a part of the application or representation of the assured, and is not required to be included in the copy of the application. The same is true as to notes of instructions given for making the application and answers, and notes and indorsements upon the back of the application made for mere convenience. *Johnson v. Des Moines L. Assn.*, 105-273.

Where the copy of the application attached to the policy indicated that it had been signed, but did not show a copy of the signature, held, that it was not such copy as required by the statute, and the terms of the application could not be considered in an action on the policy. *Seiler v. Economic L. Assn.*, 105-87.

It is the application or representations of the assured only that is required to be attached to or indorsed upon the policy. It is not necessary to indorse thereon provisions found in the by-laws of a mutual company by which the policy is issued. *Fitzgerald v. Metropolitan Acc. Assn.*, 106-457.

Endorsement of a copy of the application upon the policy, or its attachment thereto, is a necessary foundation for pleading the falsity of statements made therein. *Parker v. Des Moines L. Assn.*, 108-117.

The provisions of chap. 211, acts of 18

G. A., embodied in this section, held applicable to fraternal societies issuing certificates on lives of members. *Stork v. Supreme Lodge K. of P.*, 113-724.

### SEC. 1742. Evidence of value—proofs—action.

[For earlier annotations, see code. pages 623-5.—Ed.]

**Evidence of value.** The statute does not attempt to fix, as the measure of recovery in case of the destruction of buildings, any other than the actual value of the building at the time of loss. If, after the *prima facie* showing made by proof of the amount of insurance, the company shall offer evidence to show the actual value to be less, then the amount of recovery becomes a question for the jury, and the actual value is as the jury shall find it. The parties may, by contract, stipulate for the ascertainment of this actual value by appraisers as a condition precedent to the right of action. *Zalesky v. Home Ins. Co.*, 108-341.

Whether the latter part of this section is applicable in case of loss of personal property covered by the policy, *quaere*. *Westenhaver v. German-American Ins. Co.*, 113-726.

**Proofs of loss** furnished to the company are only admissible in evidence in the first instance to establish the fact that they were so furnished. If a schedule attached to such proofs is referred to by a witness as furnishing a correct statement of the items of property destroyed and the value thereof, it may be introduced in evidence in connection with such testimony, but the two purposes should be kept distinct. *Names v. Union Ins. Co.*, 104-612.

Under previous statutory provisions, held that proofs of death in a particular case were not sufficient. *Stephenson v. Bankers' Life Assn.*, 108-637.

**Waiver.** Good faith requires that upon receipt of proofs of loss, if the company is not satisfied therewith, it should specify its objections thereto, to the end that the proofs may be perfected if possible, and if the company fails to specify the objections at a time when they might be remedied it should not afterwards be heard to urge them. *Dyer v. Des Moines Ins. Co.*, 103-524.

The action of the company in asking for an arbitration to determine the amount to be paid is a waiver of defects in the proofs or notice of loss known to the company before the arbitration took place. *Dee & Sons Co. v. Key City F. Ins. Co.*, 104-167.

Notwithstanding a provision in the policy that none of its terms or conditions

can be waived by any person except in writing by the secretary of the company, and that no agent has any authority to waive or modify any printed conditions of the policy, an adjusting agent having power to determine what proofs are satisfactory may waive those proofs which are regarded unimportant, although certain specified proofs are required by the policy. *Brock v. Des Moines Ins. Co.*, 106-30.

Failure to object to the proofs of loss because not accompanied with affidavit, as required, amounts to a waiver of objection on this ground. *Pringle v. Des Moines Ins. Co.*, 107-742.

Where the company refuses payment on the ground that the policy has been suspended in consequence of failure to pay an installment of premium, waiver of proofs of loss may be inferred. *Pray v. Life Indemnity & Security Co.*, 104-114. *Smith v. Continental Ins. Co.*, 108-382.

Unqualified refusal to pay constitutes a waiver on the part of the insurance company of proofs of death, where something purporting to be proofs of death has been received by the company, and not objected to. *Stephenson v. Bankers' Life Assn.*, 108-637.

An agent having power to adjust a loss has authority to waive formal proofs of loss. *Lake v. Farmers' Ins. Co.*, 110-473.

Where the adjuster requires the procurement of duplicate invoices, which are prepared at considerable expense, the company cannot afterwards object that the proofs of loss are not sufficient. If the conduct of the company is such as to induce the insured to rest, in good faith, under the well founded belief of strict compliance, and that the conditions will not be insisted on, it cannot afterwards set up non-performance of such conditions as a bar to recovery. *Ibid.* *Corson v. Anchor Mut. F. Ins. Co.*, 113-641.

The promise to the company to pay is as effective as the waiver of proofs, as a denial of liability and the promise of settlement is inconsistent with insistence on strict compliance with the conditions of the contract. *Lake v. Farmers' Ins. Co.*, 110-473.

**SEC. 1742-a. Proofs of loss.** In furnishing proofs of loss under any contract of insurance for damages or loss of personal property it shall only be necessary for the assured, within sixty days from the time the loss occurs, to give notice in writing to the company issuing such contract of insurance accompanied by an affidavit, stating the facts as to how the loss occurred, so far as same are within his knowledge, and the extent of the loss, any agreement or contract to the contrary notwithstanding. [29 G. A., ch. 73, § 1.]

**SEC. 1743. Conditions.** Any condition or stipulation in an application, policy or contract of insurance, making the policy void before the loss occurs, shall not prevent recovery thereon by the insured, if it shall be shown by the plaintiff that the failure to observe such provision or the violation thereof did not contribute to the loss: *provided*, however, that any condition or stipulation referring to any other insurance, valid or invalid, or to vacancy of the insured premises or the title or ownership of the property insured, or to liens or incumbrances thereon created by voluntary act of the insured and within his control, or to the suspension or forfeiture of the policy during default or failure to pay any written obligation given to the insurance company for the premium, or to the assignment or transfer of such policy of insurance before loss without the consent of the insurance company, or to the removal of the property insured, or to a change in the occupancy or use of the property insured, if such removal, change or use makes the risk more hazardous, or to the fraud of the insured in the procurement of the contract of insurance, shall not be changed or affected by this provision. No recovery on a policy or contract of insurance shall be defeated for failure of the insured to comply, after a loss occurs, with any arbitration or appraisal stipulation as to fixing value of property. No arbitration shall take place except where the property was situated at the time of loss. Any agreement, stipulation or condition in any policy or contract of insurance by which any insurance company reserves or has the right to rebuild shall be void and of no effect in case of total loss, or where the amount of loss, upon the request of the insurance company, has been submitted to arbitration. Nothing herein shall be construed to change the limitations or restrictions respecting the pleading or proving of any defense by any insurance company to which it is subject by law. The provisions of this section shall apply to all contracts of insurance on real and personal property. [28 G. A., ch. 63, § 1.] [28 G. A., ch. 64, § 1.]

This section does not apply to forfeitures accrued under policies previously issued. *Elliott v. Farmers' Ins. Co.*, 114-153.

**SEC. 1744. Notice and proof of loss—time of bringing action—provisions not affected by contract.** The notice of loss and proof thereof required in section seventeen hundred and forty-two hereof, and the notice and proof of loss under oath in case of insurance on personal property, shall be given within sixty days from the time loss occurred, and no action for such loss shall be begun within forty days after such notice and proofs have been given to the company, nor shall the time within which action shall be brought be limited to less than one year from the time when a cause of action for the loss accrues. No provisions of any policy or contract to the contrary shall affect the provisions of this and the three preceding sections. [18 G. A., ch. 211, § 3.] [27 G. A., ch. 44, § 1.]

[For annotations, see code, pages 625-6.—Ed.]

The statutory requirement as to notice and proofs of loss is all that can be made essential by the contract. A notice and affidavit are sufficient to constitute the proof required. The sufficiency of the document is not dependent on the intent but on the contents. *Parks v. Anchor Mut. F. Ins. Co.*, 106-402.

This statute concerning proofs of loss supersedes the provisions of a policy of insurance with relation to the same matter. *Washburn-Halligan Coffee Co. v. Merchants' Fire Ins. Co.*, 110-423.

Stipulations in a policy that no officer or agent shall have power to waive any provision or condition of the policy, except such as by the terms of the policy may

be subject of agreement endorsed thereon or added thereto, do not prevent waiver of proofs of loss by an officer or agent having general authority to do so. Such a stipulation relates to the conditions and provisions of the policy, and not to their performance. *Ibid.*, and *Lake v. Farmers' Ins. Co.*, 110-473.

The defense that action on a policy is not brought within the statutory period specified in the contract is one which must be affirmatively introduced, otherwise it will be deemed waived. *Miller Brewing Co. v. Capital Ins. Co.*, 111-590.

The provision of this section as to time of bringing suit held applicable to a loss occurring prior to the taking effect of the

Code, when the statute provided that suit should not be brought within ninety days. Such a statutory provision relates to the remedy, and is no part of the contract. *Jones v. German Ins. Co.*, 110-75.

Where the policy limited the time of bringing action to six months next after the fire, held, that the six months commenced to run, not from the time of the fire, but from the time when the loss became payable, that is, sixty days after the notice and proof of loss were furnished. *Read v. State Ins. Co.*, 103-307.

The statutory provision cannot be waived and an action brought in less than ninety days after notice of loss or a waiver of notice and proof is premature. *Blood v. Hawkeye Ins. Co.*, 103-728.

Prior to the adoption of this section it was lawful for the parties to create a contract limitation which would be binding on the courts, and under this section the parties may contract as before, provided the limitation fixed by them is not less than one year. *Farmers' Co-op. Creamery Co. v. Iowa State Ins. Co.*, 112-608.

The change in the statute is not applicable to contract limitations under a policy executed before the change in the statute, and which were valid when made. *Ibid.*

Where action is prematurely brought because of failure of insured to demand an appraisal he cannot cure the defect in his proceeding by subsequently demand-

ing such appraisal and setting out the fact in the supplemental petition. *Zalesky v. Home Ins. Co.*, 102-613.

Although in the second action it is claimed that the first action was not prematurely brought, this will not sustain the second action brought after the period of limitation under the policy has expired. *Wilhelmi v. Des Moines Ins. Co.*, 103-532.

Where the first action for a loss under a policy was prematurely brought, and subsequently another action was brought after the time limited in the policy for bringing action, held, that the second action was not to be deemed a continuation of the first action under the provisions of Code § 3455. *Harrison v. Hartford F. Ins. Co.*, 67 Fed., 298.

The provisions of 18 G. A., Chap. 211, Sec. 3, relating to proofs of loss, as originally enacted, held applicable to mutual benefit associations as well as fire insurance companies. *Parsons v. A. O. U. W.*, 108-6.

The provisions of 18 G. A., chap. 211, as to time of bringing action, were not applicable to associations organized under § 1160 of the Code of '73, but associations collecting premiums instead of assessments from members were not properly organized under that section, and therefore were subject to the provisions of said act of 18 G. A. *Bradford v. Mutual Ins. Co.*, 112-495.

## SEC. 1750. Who deemed agent.

[For earlier annotations, see code, pages 628.—Ed.]

A soliciting agent with power to take and forward applications and receive money to be paid when the insurance is effected, does not have authority to bind the company by declarations as to the validity of the contract of insurance or as to the rights and liabilities of the company, when such declarations are not made while discharging his duties as agent in the transaction in question.

*Schoep v. Bankers' Alliance Ins. Co.*, 104-354.

An adjusting agent with authority to ascertain and settle losses has of necessity power to determine what proofs are satisfactory and to waive those which are regarded as unimportant. *Brock v. Des Moines Ins. Co.*, 106-30.

Section applied. *McMaster v. New York L. Ins. Co.*, 78 Fed., 33; s. c. 90 Fed., 40; s. c. 99 Fed., 856.

**SEC. 1752. Fees.** There shall be paid to the auditor of state for services required under the provisions of this chapter the following fees, which shall be accounted for by him in the same manner as other fees received in the discharge of the duties of his office:

1. For filing and examination of the first application of any company and accompanying articles of incorporation for organization in this state, and the issuing of the permission to do business, ten dollars;
2. For filing application of any foreign company for certificate to do business in this state, and the accompanying certified copy of charter or article of incorporation, twenty-five dollars;
3. For permission to foreign company to do business in this state, or certified copy thereof, two dollars;
4. For filing annual statement of a domestic company, and issuing the renewal of the permission required by law to authorize continuance in business, three dollars;

5. For filing annual statement of a foreign company, twenty dollars, and issuing renewal of permission, two dollars;
6. For each certificate of authority to agent of foreign company, two dollars;
7. For each certificate of authority to agent of domestic company, fifty cents;
8. For every copy of any paper filed, the sum of twenty cents per folio, and for affixing the official seal to such copy and certifying the same, one dollar;
9. For each certificate for publication of foreign companies, two dollars, and for each certificate for publication of Iowa companies, fifty cents. [C. '73, § 1153.] [27 G. A., ch. 45, §§ 1, 2, 3.]

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## CHAPTER 5.

### OF MUTUAL FIRE, TORNADO AND HAILSTORM ASSESSMENT INSURANCE ASSOCIATIONS.

**SECTION 1759. For what purposes.** Any number of persons may, without regard to the provisions of the preceding chapter, enter into contracts to and with each other for their insurance from loss or damage from fire, tornadoes, lightning, hailstorms, cyclones, windstorms and to insure plate glass against breakage from accident, but such associations of persons shall in no case insure any property not owned by one of their own number, except such school or church property within the territory in which they do business as may be approved, and the reinsurance of risks of similar associations. [22 G. A., ch. 93; 20 G. A., ch. 11; 17 G. A., ch. 104; 16 G. A., ch. 103; C. '73, § 1160.] [29 G. A., ch. 74, § 1.]

A mutual fire insurance company cannot issue a policy to one not a member nor for a stated and definite amount of insurance nor for a stipulated premium. One who insures his property in a mutual company in a stated amount for a specific premium does not become a member. *In re Assignment Mutual Guaranty F. Ins. Co.*, 107-143.

One who has accepted such a policy which by statute the company is not allowed to issue cannot recover therein. *Ibid.*

Members of the company are not individually liable under such a policy. *Ibid.*

An association organized under the provisions of § 1160 of the Code of '73 could not collect money from a member by way of premium. *Bradford v. Mutual F. Ins. Co.*, 112-495.

An association collecting premiums from

its members, instead of assessments, was not under that section exempt from the operation of chap. 211, acts of 18 G. A., relating to time of bringing action. *Ibid.*

The creation of a guaranty fund held not to deprive the corporation of the character of a mutual company. *Smith v. Sherman*, 113-601.

The requirements of Code § 1741 as to setting out copy of application in connection with the policy are applicable to mutual companies. *Corson v. Iowa Mut. Fire Ins. Assn.*, 88 N. W., 1086.

Although in general a money judgment cannot be rendered against an assessment company, yet if the company has issued a policy in which it agrees to pay a fixed sum in case of loss, such action may be maintained. *Byrnes v. American Mut. F. Ins. Co.*, 114-738.

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## CHAPTER 6.

### OF LIFE INSURANCE COMPANIES.

**SECTION 1771. Stock or premium notes.** No note shall be accepted as part of the capital of a stock company, nor as a premium note for the purpose of organizing a mutual company, unless accompanied by a certificate of the clerk of the district court or other court of record, of the county in which the person executing it resides, to the effect that the person making it is in

his opinion pecuniarily good and responsible therefor in property not exempt from execution. All notes heretofore or hereafter given as a part of the capital stock of a stock company, shall be deposited with the auditor of state, and in the event any stockholder shall dispose of his or her stock in such company, he or she may withdraw the note or notes so given, upon depositing with the auditor of state the note of the purchaser of such stock, accompanied by a certificate as provided for in this section. [29 G. A., ch. 75, § 1.]

**SEC. 1782. Discriminations.** No life insurance company or association[s] shall make or permit any distinction or discrimination between persons insured of the same class and equal expectancy of life in the amount or payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms or conditions of the contract it makes; nor shall any such company or association[s] or agent thereof make any contract of insurance agreement, other than as plainly expressed in the policy issued; nor shall any such company or association[s] or agent pay or allow, directly or indirectly, as an inducement to insurance, any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement whatever, not specified in the policy or contract of insurance. [23 G. A., ch. 33, § 1.] [27 G. A., ch. 46, § 1.]

It is not unlawful for an insurance company to discriminate between policy holders and those who are not policy holders in the loaning of money, nor for it to agree that one who takes insurance shall have a loan thereon. *Key v. National Life Ins. Co.*, 107-446.

The provisions of this section as to "any contract of insurance agreement other than as plainly expressed in the policy issued" is to be limited in its application by the title of the act in which it was first enacted, and by the general provisions of the section, and is therefore

applicable only to cases of discrimination. *Kelley v. Mutual L. Ins. Co.*, 109 Fed., 56.

The provision as to contracts "plainly expressed in the policy issued" includes in the term "policy" the provisions of the application endorsed thereon, in accordance with Code § 1819. *Mutual L. Ins. Co. v. Kelly*, 114 Fed., 268.

The amendment of this section made by 27 G. A., chap. 46, held not applicable where the policy had been issued and the death had occurred prior to the taking effect of the amendment. *Beverly v. Northern L. Assn.*, 112-730.

## CHAPTER 7.

### OF STIPULATED PREMIUM AND ASSESSMENT LIFE INSURANCE ASSOCIATIONS.

**SECTION 1784. Defined.** Every corporation organized upon the assessment plan, for the purpose of insuring the lives of individuals or furnishing benefits to the widows, heirs, orphans or legatees of deceased members, or accident indemnity, shall be styled an association, and any corporation doing business under this chapter which provides for the payment of policy claims, accumulation of a reserve or emergency fund, the expense of management and prosecution of the business, by payment of assessments or periodical calls, as provided in the contracts, and wherein the liability of the insured to contribute to the payment of policy claims is not limited to a fixed amount, shall be deemed to be engaged in the business of life insurance upon the assessment plan, and shall be subject to the provisions of this chapter, and chapter eight, of title nine. [21 G. A., ch. 65, § 1.] [28 G. A., ch. 65, § 1.]

[For earlier annotations, see code, page 636.—Ed.]

The statutory provisions with reference to mutual benefit associations, held to be applicable to an association organized under

such provisions, although it had not fully complied therewith. *Crocker v. Hugin*, 103-243.

Members of a mutual benefit association are bound to take notice of and be governed by its by-laws. *Fitzgerald v. Metropolitan Acc. Assn.*, 106-457.

**SEC. 1784-a. Organization—articles of incorporation.** Any number of persons not less than five, a majority of whom are citizens and residents of the state of Iowa, may associate themselves together and organize a stock or mutual corporation for the purpose of issuing policies of insurance on the lives of individuals upon the stipulated premium plan, and to grant and purchase annuities, as defined and regulated herein, and to provide for indemnity in event of death. Such associations shall adopt articles of incorporation in writing, which shall set forth:

*First.*—The name of the corporation, which shall not be the same as that of any corporation theretofore organized, or doing business in the state of Iowa, or so nearly like the name of such other corporation as to be likely to mislead the public.

*Second.*—The name of the city or town, and county, in which the principal office of the corporation is located.

*Third.*—The amount of the capital stock of the corporation, which shall not be less than fifty thousand dollars, if the same is a stock company; the number of shares into which the capital stock is divided and the par value thereof, and that the entire capital stock has been subscribed in good faith; that fifty per cent. thereof is actually paid in, and is in the possession of the directors of the corporation.

*Fourth.*—The names and place of residence of the stockholders, and the number of shares subscribed for by each.

*Fifth.*—The number of years which the corporation is to continue.

*Sixth.*—A statement that the corporation is formed for the purpose of carrying on the business of insurance under the provisions of this act. [28 G. A., ch. 65, § 2.]

**SEC. 1784-b. Stock notes—approved by auditor—revocation of certificate.** The remainder of the capital stock shall be paid in at such time as the directors of the corporation may order, and until it is so paid in it shall be evidenced and secured by the promissory notes of the stock holders, which notes shall be certified and accepted only as provided in section seventeen hundred and seventy-one of the code. Such notes shall be approved by the auditor of state and deposited with him for preservation, and he shall examine the same and the security thereon at least once each year and approve or disapprove the same. In all cases where such notes or any of them are disapproved, the association shall at once substitute new notes therefor to be approved by the auditor; and the certificate authorizing any such association to do business in the state shall be revoked in case it fails to comply with this provision. [28 G. A., ch. 65, § 3.]

**SEC. 1784-c. Number of directors.** The number of directors or managers of the corporation shall not be less than five, and shall be named for the first year of the existence of the corporation in its articles of incorporation, and their powers and duties shall be defined therein. [28 G. A., ch. 65, § 4.]

**SEC. 1784-d. Stipulated premium—plan of—defined.** Any corporation, company, or association, except level or natural premium companies, issuing policies of insurance promising money or other benefits to the policy holder, or upon his decease, to his legal representatives, or to the beneficiaries designated by him, which money or benefit is derived from stipulated premiums collected in advance from its policy holders, and from interest and other accumulations, and by which the money or other benefits so realized is applied to, or accumulated solely for, the use and purpose of the corporation and the prosecution and enjoyment of its business, and which shall comply with all the provisions of this act, shall be deemed engaged in the business of life insurance upon the stipulated premium plan, and shall be subject only to the provisions of this act. [28 G. A., ch. 65, § 5.]

**SEC. 1784-e. Mortuary premiums.** Every corporation or association doing business under this act shall charge a mortuary premium at least equal to that of yearly term insurance at age of entry, according to the actuaries' or combined experience table of mortality, with interest at four per cent. and such mortuary premium shall be increased not less than twenty per cent. for age twenty and all ages under twenty, and one per cent. additional for each additional year above the age of twenty. The net premium for renewable term policies shall not be less than the net premium at age of entrance for the term applied for, according to the actuaries' or combined experience table of mortality, with interest at four per cent. [28 G. A., ch. 65, § 6.]

**SEC. 1784-f. Mortuary fund.** After the first policy year, the mortuary premium, according to the terms of premium payments of each policy, with the percentage for age added thereto, as provided in section six hereof, together with all interest and other accumulations, except the special increase for limited payment policies, with interest thereon, as provided in section eight hereof, shall constitute the mortuary fund of the corporation. [28 G. A., ch. 65, § 7.]

**SEC. 1784-g. Limited payment and investment policies.** Any corporation or association issuing stipulated premium policies, under the provisions of this act, may issue limited payment and investment policies on which the net premium rates shall equal the full requirements of the actuaries' or combined experience table of mortality and four per cent. interest. All policies issued under the provisions of this act shall be valued as provided in section seventeen hundred and seventy-four of the code, and the net value thereof shall be deposited with the auditor of state, as therein provided. [28 G. A., ch. 65, § 8.]

**SEC. 1784-h. Surrender value.** Any corporation transacting business under the provisions of this act may allow fixed cash surrender value on the limited payment or investment policies, or the equivalent of such cash value in extended or paid up insurance, or a loan made upon the policy after three years; the amount set apart for such fixed cash value, or its equivalent, must be plainly stated in the policy, and such fixed cash value shall not be in excess of the portion of the premium, with interest accretions, collected for that purpose. [28 G. A., ch. 65, § 9.]

**SEC. 1784-i. Consolidation—reinsurance.** Any stipulated premium life insurance corporation may consolidate with any other corporation organized under this act or which is engaged in business of life insurance, or transfer, or reinsure its risks with any other corporation, or assume, or reinsure, the risks of any other corporation doing business on a similar plan, with the approval of three-fourths of the stock holders and policy holders at a regular or special meeting either in person or by written proxy, duly called for the purpose of submitting such question, provided such consolidation or reinsurance shall be approved by the auditor of state; and any such corporation may reinsure a fractional part of any single risk, but no such reinsurance shall in any manner release the corporation from its obligation under the contract with the policy holder; all such reinsurance shall be reported annually to the auditor of state. [28 G. A., ch. 65, § 10.]

**SEC. 1784-j. Reincorporation—existing contracts—deposit of securities.** Any life insurance company, corporation, or association, incorporated and doing business only upon the stipulated premium plan under the laws of this state at the time this act takes effect, may, by a majority vote of its stock or members, at an annual or special meeting of the stock or policy holders called for that purpose, reincorporate as a stock or mutual corporation or association, and accept the provisions of this act, and amend its articles of incorporation to conform herewith, and such company shall, when so reincorporated under the provisions of this act, exercise and enjoy all the provisions and privileges hereof, as though it had been originally incorporated

hereunder, after it has filed such amended articles of incorporation in the office of the secretary of state; such reincorporation however shall be subject to the approval of the auditor of state and the attorney-general and shall not annul, modify, or change any of the existing contracts or liabilities of such corporation, company, or association, and such contracts or liabilities shall continue as though such corporation, company, or association had not reincorporated under this act, and such reincorporation shall not prejudice or affect any pending litigation, or any rights previously acquired. A deposit by such association with the auditor of state of approved securities in an amount equal to the valuation of all limited payment and investment policies within ninety (90) days, and the full valuation of all ordinary life and all other kinds of policies within seven years from the date of such reincorporation, shall be deemed a compliance with section eight (8) hereof. [28 G. A., ch. 65, § 11.]

**SEC. 1784-k. Certificates—association.** The term “certificates of membership” or “certificate,” when used with respect to insurance of persons on a stipulated premium plan, shall be taken to mean and include policies of insurance. The words “association” or “associations,” when so used, shall be taken to mean and include corporation or corporations. [28 G. A., ch. 65, § 12.]

**SEC. 1784-l. Approval of articles of incorporation—notice published.** The articles of incorporation of companies organized under the provisions of this act shall be submitted to the auditor of state and the attorney-general, and if found by them to comply with the provisions of this act they shall approve the same. When the articles of incorporation are so approved, they shall be recorded in the office of the secretary of state, and a notice published within ninety days thereafter, in the manner, and for the time provided in the general corporation laws of the state. [28 G. A., ch. 65, § 13.]

**SEC. 1784-m. Foreign companies—compensation of officers.** Any corporation or association organized under the laws of any other state, for the purpose of insuring the lives of persons on the stipulated premium plan, may be permitted to do business in this state under the provisions of this act, upon the following conditions: Such company shall file with the auditor of state a copy of its articles of incorporation, duly certified by the proper officer of the state in which it was organized, together with a copy of its by-laws, applications, and policy contracts. It shall also file with the auditor of state a statement signed and verified by its president and secretary, which shall give the name and location of the corporation or association, its principal place of business, the name of its president, secretary, and other principal officers, the number of policies in force, the aggregate amount insured thereby, the amount paid to beneficiaries in event of death, the amount paid on the last death loss and the date thereof, the amount of cash and other assets owned by the corporation or association, the manner in which the same is invested, and any other information which the auditor of state may require. If the statements, papers, and proofs thus filed shall show that it has sufficient available funds to comply with its contracts and pay them in full, and that it is legally organized and honestly managed, the auditor of state shall, upon its complying with the provisions of this section and of section eighteen hundred and eight of the code and upon the payment to the auditor of the sum of twenty-five dollars, issue to it a certificate of authority to do business in this state, if the same right is extended by the state in which such corporation or association is organized to corporations or associations of the same class organized and doing business in this state. If at any time the auditor doubts the solvency of any foreign corporation or association doing business in this state under the provisions hereof, and the failure to pay the full limit named in its policies of insurance shall be evidence of such insolvency, he shall, at the expense of such corporation or association, cause an examination of its

books, papers, and business; and if upon such examination he finds such corporation or association not to be financially sound, or that it is not paying its policies in full, or that it is conducting its business fraudulently, or that it has failed to make the statement required by law, he may revoke its authority and prohibit it from doing business in this state until it shall in all respects comply with the provisions of this act. If the auditor appoints some person not receiving a regular salary in his office to make such examination, the person so appointed and making such examination shall receive five dollars per day for his services, and in addition thereto his traveling and hotel expenses, which amounts shall be paid by the corporation or association examined, or by the state, upon the approval of the executive council, if such corporation or association fails to pay the same. No insurance corporation, company, or association incorporated and doing business under the provisions of this act shall pay its officers or agents any compensation in excess of the fair and reasonable value of such services to the corporation; and any excess of compensation so paid may be recovered in an action brought in a court of competent jurisdiction against any officer or agent receiving such compensation, or any officer knowingly consenting to the allowance thereof within three years from the receipt of said illegal compensation. Said action may be brought in the name of the insurance company or association, or may be brought in the name of any share holder or policy holder for the benefit of such share holder or policy holder. [28 G. A., ch. 65, § 14.]

**SEC. 1784-n. What statutes apply.** The provisions of sections seven-hundred and seventy (1770), seven-hundred and seventy-five (1775), seven-hundred [hundred] and eighty-five (1785), seven-hundred and eighty-nine (1789), seven-hundred and ninety (1790), seven-hundred and ninety-one (1791), seven-hundred and ninety-two (1792), seven-hundred and ninety-three (1793), seven-hundred and ninety-five (1795), eight-hundred and thirty-nine (1839), chapter [eight] (8), and the provisions of chapter eight (8), of title nine (9) of the code, and all acts amendatory of said sections and chapter, and all statutes now or hereafter enacted affecting life insurance companies so far as applicable and not inconsistent with this act shall apply to and control corporations organized under this act. [28 G. A., ch. 65, § 15.]

**SEC. 1784-o. Penalty.** Any company, corporation, or association transacting, attempting, or claiming to transact business under this act, or using the term "stipulated premium" in its applications, policies, contracts, advertisements, or literature, without having complied with the provisions hereof, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding five hundred dollars. [28 G. A., ch. 65, § 16.]

#### SEC. 1786. Name.

[For earlier annotations, see code, page 637.—Ed.]

The provisions of Code § 1689 as to associations organized under this chapter. including the word "mutual" in the name of a mutual company has no application to *Moore v. Union Frat. Acc. Assn.*, 103-424.

#### SEC. 1788. Assessments.

[For earlier annotations, see code, pages 637-8.—Ed.]

While in the enforcement of a claim for a death loss against a mutual benefit association resort must be had in the first place to an action in mandamus to compel a levy of an assessment, yet, where the corporation fails to make the levy at a time when it would be effectual in furnishing the fund for the payment of the claim, and postpones it until long after, when by

reason of decrease in the membership in the association it becomes ineffectual, the association may be held liable in damages. *Christie v. Iowa L. Ins. Co.*, 111-177.

In such case interest from the time the money should have been collected and paid over under the terms of the contract may be added. *Ibid.*

**SEC. 1789. Insurable age—beneficiary—assignment of policy.**

[For earlier annotations, see code, page 638.—Ed.]

The provision as to change of beneficiaries relates to the certificate and not to the fund, and the word "assignment" as here used is equivalent to the word "endorsement". A beneficiary who is substituted by the act of the person on whose life the certificate is issued is not an assignee of the certificate. *Shuman v. Supreme K. of H.*, 110-480.

Where the right to change the beneficiary is specifically provided for in the certificate, and the manner of doing so is pointed out, the method indicated must be adopted and if that method involves the issuance of a new certificate, the endorsement of a certificate without the observance of the formalities required will not give the endorsee a right to the proceeds as against the beneficiaries designated by the certificate itself. *Shuman v. A. O. U. W.*, 110-642.

An association is not precluded by the provisions of this section from assuming by consolidation the liability of another association to a member, although at the time of such consolidation the member is over the age when a valid certificate could have been issued. *Cathcart v. Equitable Mut. L. Assn.*, 111-471.

Until the beneficiary is changed by law, he has an actual, subsisting interest in the policy which will pass to his administrator in case of his death, and as against such beneficiary, or his administrator, suicide on the part of the insured is not a defense in the absence of a provision to that effect in the policy. But fraud, in procuring a policy with the intent to commit suicide, will vitiate the entire contract, and defeat recovery. *Parker v. Des Moines Life Assn.*, 108-117.

Where the benefit was made payable to the wife of the deceased, who was dis-

qualified to collect it on account of having feloniously caused the death of her husband, held that her heirs had no interest in the benefit fund, but that the amount payable was held in trust by the association for the estate of the deceased. *Schmidt v. Northern Life Assn.*, 112-41.

The beneficiary named in such a certificate has no property right therein, but only an expectancy. If a beneficiary is designated who does not belong to the class of persons enumerated by statute, the insurance becomes payable to those who would have been entitled to it in the absence of any designation. *Ibid.*

This section applies to foreign as well as domestic companies. *Belknap v. Johnston*, 114-265.

Where the certificate is a contract of insurance, made in another state, and change of beneficiary is made and completed in that state, according to its laws, it will be valid. *Ibid.*

The right to change beneficiary existing in such other state at the time the contract was made cannot be affected by subsequent legislation of such state. *Ibid.*

In an action against a mutual benefit company by one claiming under a certificate as wife of the insured, the company defending on the ground that insured had a prior wife living, and that plaintiff was not, therefore, entitled to the benefit, has the burden of showing that a prior marriage existed, and had not been dissolved. *Parsons v. A. O. U. W.*, 108-6.

Where it was provided that the certificate should not be assignable in payment of or security for any debt, held, that the assignment thereof as a security was invalid and the creditor acquired no rights thereunder. *Crocker v. Hogan*, 103-243.

**CHAPTER 8.****OF PROVISIONS APPLYING TO LIFE INSURANCE COMPANIES AND ASSOCIATIONS.****SECTION 1805. Policy exempt from execution.**

[For earlier annotations, see code, pages 642-3.—Ed.]

The execution of an ordinary life policy confers immediately a vested right upon and raises an irrevocable trust in favor of the party named as beneficiary, a right which cannot be impaired without the beneficiary's consent. *Haerther v. Mohr*, 114-636.

Where a bankrupt holds a policy payable to himself, his heirs or legal representatives, the surrender value thereof will be a part of the assets of his estate in

bankruptcy, under the provisions of the federal bankrupt law. *In re Lange*, 91 Fed., 361; *In re Steele*, 98 Fed., 78.

The provisions of the bankrupt law as to exemption of policies of life insurance are only applicable to cases where there is no exemption by the state law, but so far as such policies are exempt by the state law such exemption is recognized under the general provisions as to exempt property. *Steele v. Buel*, 104 Fed., 968.

**SEC. 1806. Investment of funds.** The funds required by law to be deposited with the auditor of state by any company or association contemplated in the two chapters preceding, and the funds or accumulations of any such company or association organized under the laws of this state, held in trust for the purpose of fulfilling any contract in its policies or certificates, shall be invested in the following described securities and no other:

1. The bonds of the United States;
2. The bonds of the state or of any other state when such bonds are at or above par;
3. Bonds and mortgages and other interest bearing securities being first liens upon real estate within the state or any other state in which such company or association is transacting an insurance business, worth at least double the amount loaned thereon and secured thereby exclusive of improvements, or two and one-half times such amount including the improvements thereon, if such improvements are constructed of brick or stone; but no such improvements shall be considered in estimating the value unless the owner shall contract to keep the same insured in some reliable fire insurance company or companies authorized to do business in the state, during the life of the loan, in a sum at least double the excess of the loan above one-half the value of the ground exclusive of the improvements, the insurance to be made payable in case of loss to the company or association investing its funds, as its interests may appear at the time of loss;
4. Bonds or other evidences of indebtedness of any county, city, town or school district within the state or any other state in which such company is transacting an insurance business, where such bonds or other evidences of indebtedness are issued by authority of and according to law and bearing interest, and are approved by the executive council;
5. In the stock of solvent national banks organized under the laws of the United States, but not more than five per cent. of the assets of such company or association shall be thus invested;
6. Loans upon its own policies, in an amount not exceeding the net terminal reserve or advanced insurance fund against the same, as shown by the valuation thereof made under the direction of the auditor of state. If such loan is made the company must describe in the note or contract taken the amount of the loan, the name of the borrower, the number of the policy, or such description, satisfactory to the auditor of state, whereby the terms of such note or contract makes the amount loaned a lien against such policy, and such note or contract shall be numbered, dated, and signed, giving the post-office address of the insured. All such securities shall be deposited with the auditor of state, who shall furnish the company or association depositing them a certificate, under the seal of his office, showing the purpose of the deposit and to what fund it is to be applied when paid. [25 G. A., ch. 33; 24 G. A., ch. 30; 21 G. A., ch. 65, § 9; 21 G. A., ch. 169; 17 G. A., ch. 47; C. '73, § 1179.] [28 G. A., ch. 66, § 1.]

**SEC. 1812. Physician's certificate.**

To defeat recovery on account of false statements as to the health of the applicant, the defendant must show, not only that the statements of the applicant were false and fraudulent, but that the examiner was deceived thereby. But the defendant is not estopped by the certificate of the medical examiner from setting up fraud on the part of the applicant in procuring such certificate on which the policy was issued. *Welch v. Union Central L. Ins. Co.*, 108-224.

The purpose of this statutory provision, estopping the company from setting up misrepresentations as to the health of deceased where a medical examiner has passed on the fitness of the applicant, is to prevent recovery being defeated on any policy where the company has, by its agent, examined and passed upon the fitness of the applicant for insurance, and it is quite immaterial what representations have been made, or warranties given. The fraud or deceit referred to in the statute.

is that of procuring the report or certificate of the physician, and not the policy. *Weimer v. Economic L. Assn.*, 108-451.

Unless the examiner is deceived by answers in the application, or in some other way, the company is not entitled to have the condition of health of the insured at the time of the issuance of the policy investigated. In the absence of fraud or deceit practiced on the medical examiner the company is estopped from questioning the truthfulness of the answers made by the insured in the application. *Stewart v. Equitable Mut. L. Ins. Assn.*, 110-528.

Under this section the company is estopped from inquiring into the correctness of answers in the application, in the absence of an allegation that the medical examiner's report was procured through fraud or deceit. The fact that the statements in such application amount to warranties is immaterial. *Nelson v. Nederland L. Ins. Co.*, 110-600.

The provisions of this section evidently relate to procedure, and not to the validity of the contract, and therefore control in an action on a policy issued in another state by a foreign insurance company. *Ibid.*

The medical examiner or physician referred to in this section is the person who examines the applicant and determines his condition of health and reports whether he is a proper risk. *Peterson v. Des Moines L. Assn.*, 87 N. W., 397.

Where a physician reports in favor of the application, and it is not proven that such report was secured by fraud practiced upon the physician, the defendant is estopped from denying the truthfulness of the applicant's representations. *Brown v. Modern Woodmen*, 88 N. W., 965.

Section applied. *Metzradt v. Modern Brotherhood of America*, 112-522.

#### SEC. 1819. Copy of application.

The provisions of 18 G. A., chap. 211, G. A., as to attaching copy of application to policy (now embodied in Code § 1741) held applicable to fraternal societies. *Stork v. Supreme Lodge K. of P.*, 113-724.

Section applied. *Mutual L. Ins. Co. v. Kelly*, 114 Fed., 268.

As applicable to this section, see notes to Code § 1741.

#### SEC. 1820. Limitation of action.

The provisions of 18 G. A., chap. 211, § 3, relating to proofs of loss, held applicable to mutual benefit associations, as well

as fire insurance companies. *Parsons v. A. O. U. W.*, 108-6.

### CHAPTER 9.

#### OF FRATERNAL BENEFICIARY SOCIETIES, ORDERS OR ASSOCIATIONS.

**SECTION 1832. Annual certificate.** The auditor of state shall, upon the application of any such association, issue to it a permit in writing, authorizing it to do business within this state for a period of one year from April first of the year of its issue, for which certificate and all proceedings in connection therewith such association shall pay to said auditor the fee of twenty-five dollars, and for each annual renewal thereof a like sum shall be paid. Provided, however, that before such certificate shall be issued, the fraternal beneficiary society, order or association shall have actual applications upon at least two hundred and fifty lives for at least one thousand dollars each. [26 G. A., ch. 21, § 12.] [27 G. A., ch. 47, § 1.]

#### SEC. 1834. Changing beneficiary.

Where the parties have agreed upon a mode by which a change of beneficiary may be effected, the change can be made in that mode only, unless by subsequent agree-

ment, assented to by the association, a different mode is substituted. *Modern Woodmen v. Little*, 114-109.

## CHAPTER 10.

## OF SAVINGS BANKS.

**SECTION 1844. Powers.**

Under a previous statutory provision that a savings bank should not make a loan of money to any one person in excess of a certain per cent. of its capital, held that such provision did not render loans in excess void, the prohibition being intended as a rule for the government of the

bank. *Benton County Sav. Bank v. Bodicker*, 105-548.

A savings bank is not liable for the negligence of a clerk furnished by it to keep account of the sales at a public auction and take notes with good security for such sales. *Willett v. Farmers' Sav. Bank*, 107-69.

**SEC. 1848. Deposits.** Any savings bank organized under this chapter may receive on deposit money equal to twenty times the aggregate amount of its paid up capital and surplus, and no greater amount of deposits shall be received without a corresponding increase of the aggregate paid up capital and surplus, which capital and surplus shall be a guaranty fund for the better security of depositors, and invested in safe and available securities. The deposits so received shall be paid to such depositor or his representative, when requested, with such interest and under such regulations as the board of directors shall, from time to time, prescribe, not inconsistent with the provisions of this chapter, which shall be printed and conspicuously exposed in the business office of the bank, in some place accessible and visible to all; and no alteration which may at any time be made in such rules and regulations shall affect the rights of depositors acquired previously thereto in respect to deposits or interest thereon. Savings banks may require sixty days' written notice of the withdrawal of savings deposits, but when there are sufficient funds on hand the officers thereof may, in their discretion, waive this requirement. They may close any account, upon such written notice as may be provided for in the by-laws, directing a depositor to withdraw his deposits, after which it shall cease to draw interest. But nothing in this chapter shall prevent such banks, in their discretion, issuing certificates of deposit payable upon demand. [15 G. A., ch. 60, § 7.] [28 G. A., ch. 67, §§ 2, 4.] [29 G. A., ch. 167, § 1.]

**SEC. 1850. Investment of funds.**

The authority to discount, sell, purchase, and make loans on commercial paper, notes, etc., authorizes a savings bank to make a contract for the purchase of notes,

notwithstanding the inhibition on contracting debt. *Ubbinga v. Farmers Sav. Bank*, 108-221.

**SEC. 1850-a. Surplus fund—how invested.** The directors of any savings bank may set apart from its earnings, over and above expenses, any desired sum as a surplus fund, to be maintained as such, separate and apart from earnings usually carried and designated as undivided profits, and which surplus fund shall not be drawn upon for the payment of expenses or dividends, except that it may be made use of as a stock dividend for increasing the capital of the bank. Such surplus fund shall be invested in the same manner as the capital of the bank, as provided in section eighteen hundred and forty-eight (1848) of this chapter. The directors may transfer said surplus fund, or any part of the same, back to the undivided profits account, and make use of the same, when so transferred, for the payment of expenses and dividends when the deposits of the bank shall be less than ten times the capital, or capital and remaining surplus, and not otherwise. [28 G. A., ch. 67, § 1.]

**SEC. 1852. Interest—dividends.** No dividend shall be declared or paid to stock holders, save out of the undivided profits on hand after paying or setting apart sums sufficient for the payment of all expenses in operating

the bank, and of interest to depositors according to the rate fixed therefor by the board of directors from time to time. The bank shall pay interest to the depositors, when due, upon presentation of deposit book or certificate. [15 G. A., ch. 60, § 11.] [28 G. A., ch. 67, § 3.]

## CHAPTER 12.

### OF BANKS.

**SECTION 1870. Limit of liabilities.** The total liabilities to any savings or state bank of any person, corporation, company or firm, for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed twenty per cent. of the actually paid up capital of such bank; provided that they may loan not to exceed one half of their capital stock to any person, corporation, company or firm on notes or bonds secured by mortgage or deed of trust upon unencumbered farm land in this state, worth at least twice the amount loaned thereon; but the discount of *bona fide* bills of exchange drawn against actually existing value, and the discount of commercial or business paper actually owned by the person or persons, corporation, company or firm negotiating the same, shall not be considered money so borrowed. [25 G. A., ch. 30, § 2; 15 G. A., ch. 60, § 18.] [29 G. A., ch. 76, § 1.]

#### SEC. 1872. Quarterly statements.

What is said in this section relating to deposits and exchange does not indicate that the section applies to corporations like investment companies not engaged in a general banking business. *Williams v. Lewis Investment Co.*, 110-635.

#### SEC. 1877. Proceedings against by state—receivers.

[For earlier annotations, see code, page 659.—Ed.]

The receiver of an insolvent bank appointed under a proceeding brought by the auditor of state under statutory provisions may have an order on the stockholders for the payment of an assessment in such amount as appears to be necessary to meet the liabilities of the bank (under provisions as to double liability of stockholders) and the stockholder is bound to pay the amount of such assessment without waiting for the final distribution of the assets of the bank. In such case the time for collection of such assessment and the amount to be collected can best be left to the sound discretion of the court, the proceeding being one where the estate of the bank is in process of liquidation by direction of the auditor of state. *State ex rel. v. Union Stock Yards State Bank*, 103-549.

#### SEC. 1882. Liability of shareholders.

[For earlier annotations, see code, page 660.—Ed.]

The statutory provision rendering stockholders liable to the extent of double the value of their stock for the debts of the bank is not an act authorizing the creation of corporations with banking powers, etc., without submission to the people within the constitutional prohibition. *State ex rel. v. Union Stock Yards State Bank*, 103-549.

Under the provisions of 18 G. A., chap.

208, incorporated into this section, but which as originally passed related to corporations in general, held that the liability provided for in case of buying and selling exchange, etc., applied to the banking business only, and not to an investment business, although the corporation carrying on the business had authority to receive deposits of money. *Williams v. Lewis Investment Co.*, 110-635.

#### SEC. 1885. Penalty.

[For earlier annotations, see code, pages 660-1.—Ed.]

This section contemplates time deposits as well as deposits subject to check and therefore the issuance of a certificate of deposit for money paid in when the bank is insolvent is a criminal act. *State v. Boomer*, 103-106.

The insolvency of the bank may be proven by the testimony of experts familiar with the banking business. *Ibid.*

The provisions of this section are applicable to the officer of a national bank. *State v. Easton*, 113-516.

**SEC. 1889. Statement—doing business—loan and trust companies.**

The president and cashier of every savings and state bank shall cause to be kept at all times a full and correct list of the names and residences of the officers, directors, examining committee, and of all the stockholders in the bank, and the number of shares held by each, in the office where its business is transacted. Said list shall be subject to the inspection of all the stockholders and creditors of the bank during business hours of each day in which business may be legally transacted. A copy of such list, verified by the oath of the president or cashier, shall be transmitted to the auditor of state within ten days after each annual meeting. No corporation shall engage in the banking business, receive deposits, and transact the business generally done by banks, unless it is subject to and organized under the provisions of this title, or of the banking laws of the state heretofore existing, except that loan and trust companies may receive time deposits subject to the same limitations as are now or may hereafter be prescribed for the receiving of deposits by state banks and issue drafts on their depositaries, but such companies shall be subject to examination, regulation and control by the auditor of state, like savings and state banks, and their stockholders shall be liable to the creditors of such companies as provided in section eighteen hundred and eighty-two of this chapter for stockholders in savings and state banks. Any corporation violating this section shall forfeit its charter at the suit of the attorney-general, and said corporation, its officers, directors and agents, shall be punished by a fine of not less than five hundred dollars, or imprisonment of not less than two years in the penitentiary, or by both such fine and imprisonment, at the discretion of the court; provided that loan and trust companies organized under the general incorporation laws of the state, which were engaged in the banking business prior to the first day of January, 1886, and have continued therein since said date, may, by the proper additions to their articles of incorporation, become state banks within the provisions of this title, without incorporating the word "state" in the names of such corporations. [28 G. A., ch. 68, § 1.]

CHAPTER 13.

OF BUILDING AND LOAN ASSOCIATIONS.

**SECTION 1890. Defined.**

The fundamental purpose of these associations is to assist members by small periodical payments to acquire homes. *Home Sav. & Trust Co. v. Fidelity & Dep. Co.*, 88 N. W., 821.

Comity between states does not require the courts of this state to enforce a contract or apply a remedy with reference to a foreign building and loan association which contravenes or nullifies the settled policy of this state with reference to such associations. *Field v. Eastern Bldg. & L. Assn.*, 90 N. W., 717.

Where the contract issued by a building and loan association was evidently intended to be construed by the stockholder to whom it was issued as providing for full payment of the par value of the stock after the payment of specific sums by way of dues

for a fixed time, held that the contract would be so constructed as against the association. *Ibid.*

Such a contract is not affected by subsequent amendments to the by-laws, which are made parts of the contract, in the absence of any provision authorizing a change of the terms of the contract by such amendments. *Ibid.*

Such an association although mutual in name may in the absence of statutory restrictions bind itself to make payment of the par value of its stock after fixed payment of dues have continued for a specified time. *Ibid.*

The retroactive provisions of 26 G. A., chap. 85, and 27 G. A., chap. 48, were not unconstitutional. *Iowa Sav. & Loan Assn. v. Selby*, 111-402.

**SEC. 1893-a. Articles amended—maximum rate—appointment of receiver.** The provisions of this act shall apply to all building and loan and savings and loan associations hereafter incorporated as well as those now incorporated under the laws of this state or doing business herein, and all such associations shall amend their articles of incorporation so as to conform to the provisions of this act. No such associations shall be authorized or empowered to collect or receive premiums and interest from a borrower at a greater rate than eight per cent. and in case of an amendment to the articles of incorporation so that a lower rate of interest or charge for the use of money loaned to the borrowing member is authorized than the rate of interest charged upon loans, to members who have theretofore borrowed, shall in like manner be reduced to the same rate as that permitted to borrowers after such amendments to the articles of incorporation, so that the interest charged under whatever name, whether charged as premium or interest to all members of the same association, shall be the same, all reductions of the rate of interest or premium charged to new borrowers shall be made and apply equally to those who have theretofore borrowed. In case any such association doing business in the state shall fail to amend its articles of incorporation in conformity herewith prior to July 15th, 1900, its authority to do business in this state shall be revoked by the executive council, and under the direction of the executive council application by the attorney-general shall be made to the proper court for the appointment of a receiver to wind up the affairs of the association, and in such proceedings the amount due from the borrowing member on mortgages shall be ascertained in the manner provided in section 7 of this act, and the balance due on such mortgages shall be treated and considered as due within a reasonable time to be fixed by the court after the appointment of a receiver. [28 G. A., ch. 69, § 10.]

**SEC. 1894-a. Revocation of certificates.** The executive council shall have the power, and it shall be its duty, to revoke any certificate of authority given to any building and loan or savings and loan association whenever it appears to said council that said association is transacting business illegally, or is unjust and oppressive to its members or the public. [28 G. A., ch. 69, § 11.]

**SEC. 1898. Nature of business—statement.** All building and loan or savings and loan associations, upon receiving the certificate from the auditor, shall have power, subject to the terms and conditions contained in their articles of incorporation and by-laws, to issue stock to members to be paid for in single, stated, or monthly payments, but not more than ten thousand dollars of stock, computed at par value, of any kind shall be issued to one person; to assess and collect from members such dues, membership fees, fines, premiums, and interest on loans as may in the articles of incorporation and by-laws have been provided, and the same shall not be held to be usurious; to permit members, other than holders of guarantee stock, to withdraw all or a part of their stock deposits upon such terms and at such times as the articles of incorporation and by-laws may provide; to acquire, hold, encumber and convey such real estate and personal property as may be necessary for the transaction of their business; to make loans to members on such terms, conditions and securities as the articles of incorporation and by-laws provide; said loans to be made only on real estate security, or on the security of their own shares of stock, not to exceed ninety per cent. of the withdrawal value thereof. It shall be the duty of the secretary of every such association doing business in this state to prepare, on or before February fifteenth of each year, a duly verified statement, showing the book value and withdrawal value of a share of each class of stock in said association, for each monthly period up to January first preceding, and file the same with the auditor of state, which shall be preserved in his office. And the said association shall, on or before February fifteenth of each year, mail to each shareholder a written or printed copy of the same. In case of foreclosure, the

borrower shall be charged with the full amount of the loan made to him, together with the dues, interest, premium and fines for which he is delinquent, and he shall be credited with the same value of his pledged shares as if he had voluntarily withdrawn the same. In event that judgment is obtained against a borrower from a building and loan association, no greater recovery shall be had than the net amount of principal actually received, with interest thereon at a rate not greater than twelve per centum per annum on the net amount of loan actually received by and paid to borrower, with statutory attorney fees; no evasion of this provision shall be had by means of any dues, membership fees, premiums, fines, forfeitures or other charges, any agreement to the contrary notwithstanding. [The provisions of said section shall apply to and govern all contracts between building and loan and savings and loan associations and their members, made and entered into prior to the taking effect of the code, and every such contract shall in all actions and proceedings be construed and enforced as in said section provided, and with the same force and effect as if made and entered into after the code took effect, anything in the statutes in force when such contracts were made to the contrary notwithstanding.] [26 G. A., ch. 85, § 9; C. '73, §§ 1185, 1186.] [27 G. A., ch. 48, § 1.]

[For annotations, see code, page 664.—Ed.]

[The above section was amended by the 27th G. A., chapter 48, section 1, by adding thereto the portion enclosed in brackets. By section 12, chapter 69, of the 28th G. A., said chapter 48 of the 27th G. A. is repealed; and section 16 of chapter 69 of the 28th G. A. legalizes all loans affected by the repeal of said chapter 48. The supreme court of Iowa, however, in the case of *Kdworthy et al. vs. Iowa Savings and Loan Association*, 86 N. W., 315, has held the repealing act unconstitutional so far as it affects contracts legalized by chapter 48 of the 27th G. A., hence it is inserted herein, as being still in force as to certain loans.—Ed.]

**Powers.** While a building and loan association can only loan money on the security prescribed by statute, yet, as incident to the transaction of its business, it may make a loan on real property on the basis of a valuation fixed with reference to improvements to be made, and accept a bond as security that such improvements will be made in order that the value of the property shall be sufficient to sustain the loan. *Home Sav. & Trust Co. v. Fidelity & Dep. Co.*, 88 N. W., 821.

**Settlement.** Where the by-laws contained provisions for withdrawal of members and paying back contributions out of the loan fund, only a percentage of which could be used for such purpose, held, that the withdrawal member was not a preferred creditor as to the funds of the association after it had become insolvent, the percentage of the fund applicable to the payment of withdrawals having been exhausted. *Rabbitt v. Wilcoxon*, 103-35.

Where the association is insolvent and unable to pay each stockholder the book value of his shares, the borrowing shareholder is entitled only to credit for the withdrawal value of his shares, and not for the book value consisting of the amount of installments paid on the stock and the earnings thereof at the last dividend period. If a borrowing member is allowed for all the payments he has made and the earnings thereof, the loss of the association will fall upon the members who have not borrowed, and inequality between the

two classes of members will result. An equitable distribution of the assets, if any, in excess of the liabilities, should be effected, and the borrowing member should only be entitled to credit for the actual value of his shares. *Wilcoxon v. Smith*, 107-555.

There is nothing in the statute authorizing a building and loan association to raise money on certificates in any other way than by issuing shares of stock, and the stockholders constitute its members. *Teller v. Wilcoxon*, 110-565.

Therefore the holder of a certificate of stock is not a creditor of the association entitled to preference over other members in the winding up of its affairs. *Ibid.*

In the settlement of the affairs of an insolvent building and loan association a borrowing member whose stock has not matured is to be held for the amount of money actually received by him, with interest thereon, less the premium actually paid by him for the loan, and less the interest on the monthly payments of interest made by him. This rule applies to cases where the affairs of the association are not so far settled as to ascertain the value of the stock. When the value of the stock can be determined, the borrower should then be entitled to credit for its value, in addition to the items mentioned. *Hale v. Kline*, 113-523.

Where the association is solvent and seeking foreclosure, a withdrawing shareholder is entitled to have credited on his

stock the dues, but not the premiums paid, for the latter go into the profit fund, and are to be shared equally by all members. But where the association is insolvent, a borrowing member is entitled to credit on his debt for premiums paid, but not for interest nor dues. *Spinney v. Miller*, 114-210; *Tootle v. Singer*, 88 N. W., 446.

Premiums form a part of the profit fund when paid, and go to the increase of value of shares. If the association is insolvent the borrower should be allowed his share of the profit fund, made up in part of the premiums, but no further credit on account of premiums paid. *Briggs v. Iowa Sav. & L. Assn.*, 114-232.

The fact that interest is exacted monthly instead of at longer intervals will not make the contracts usurious. *Ibid.*

Premiums, interest, usury. Where the borrower has authorized the secretary of the association to make a certain bid for priority of loan, it will be presumed, in the absence of evidence to the contrary, that the bid was made by the secretary and the money obtained thereby. In such a transaction the contract is not usurious, no interest being charged on the premium bid. *Hawkeye State Savings & Loan Assn. v. Johnston*, 106-218.

It is not unconstitutional to authorize building and loan associations to charge by way of interest or premium more than the lawful rate of interest. The profits inure to the benefit of the borrower with other stockholders. *Iowa Sav. & L. Assn. v. Heidt*, 107-297.

In the absence of express statutory provision it is not lawful for the association to exact from the borrower a sum by way of premium which in addition to the interest contracted for renders the amount to be paid for the loan greater than lawful interest. But payment by the borrower of necessary expenses in making the loan in addition to legal interest will not constitute usury. *Ibid.*

The association may deduct from the amount of the loan charges for making abstract, examination of the same and appraisal. If these charges are actually for amounts paid out it is immaterial that they are entered as expenses for making the loan. *Ibid.*

The association may deduct a portion of the dues to cover the expense of management. *Ibid.*

The statute authorizes penalties for the

**SEC. 1898-a. Repeal.** Chapter forty-eight (48) of the acts of the twenty-seventh general assembly, and all acts and parts of acts in conflict with this act, are hereby repealed. [28 G. A., ch. 69, § 12.]

[The above section repeals the portion of the preceding section inclosed in brackets, which is section 1, chapter 48, of the 27th G. A.—Ed]

The repeal of the act of 27 G. A. does not render unlawful loans which, though unlawful when made, were rendered valid

non-payment of dues and unless exorbitant they will not be unlawful. *Ibid.*

It is not required that the premium be paid in advance. It may be made payable in monthly installments. But the premium provided for must be fixed and paid in good faith to secure the loan, and not as a mere device to evade the law against usury. If the sums nominally paid as premiums are for the use of the money loaned, and the monthly payments of premium and interest together exceed the highest rate of interest allowed by law, the loan is usurious. *Wilcoxon v. Smith*, 107-555.

Under the provisions of § 1185 of the Code of '73, authorizing building and loan associations to levy, assess and collect from the members dues, fines, interest and premiums, which shall not be construed to make the loan usurious, held that even though it were necessary to avoid the usury law in such case that the association adopt a by-law authorizing the collection of such dues, interest and premiums, the existence of such by-law was sufficiently shown by the instrument evidencing the loan. *Building Sav. & Loan Assn. v. Froelich*, 110-244.

The burden is upon the borrower to show that there was in fact no bidding for the right of precedence in making the loan which would serve as a basis for a premium. *Ibid.*

As to the legalizing act, 27 G. A., chap. 48, see *Guaranty S. & L. Assn. v. Ascherman*, 108-150.

The curative act, removing the objection of usury to loans of building associations is valid as to contracts previously made, if the borrower continues to recognize the contract as valid after the change in the law. *Iowa Sav. & L. Assn. v. Heidt*, 107-297. *Iowa Sav. & L. Assn. v. Curtis*, 107-504.

Where a loan had been purged of usury by the provisions of 27 G. A., chap. 48, held that the repeal of that act by 28 G. A., chap. 69, did not restore the defense of usury as against such loan. *Edworthy v. Iowa S. & L. Assn.*, 114-220.

The borrower cannot be required to pay more than twelve per cent. per annum, payable monthly, on the loan. *Iowa Cent. Building & L. Assn. v. Vogt*, 87 N. W., 726.

The act of 27 G. A., chap. 48, legalizing loans previously made by such associations, is applicable to foreign as well as domestic companies. *Tootle v. Singer*, 88 N. W., 446.

by such act of 27 G. A. *Edworthy v. Iowa Sav. & L. Assn.*, 114-220.

**SEC. 1898-b. Loans, contracts and mortgages legalized.** All loans, contracts, and mortgages which are affected by the repeal of said chapter forty-eight (48), acts of the twenty-seventh general assembly, are hereby legalized so far as to permit recovery to be had thereon for interest at the rate of eight (8) per cent. per annum, but at no greater rate, and nothing contained in such contracts shall be construed to be usurious so as to work a forfeiture of any penalty to the school fund. [28 G. A., ch. 69, § 16.]

**SEC. 1898-c. Forbidden stocks—rate of dividend.** That no building and loan or savings and loan associations shall issue guaranty stock, fully paid stock, or single payment stock, or any stock of any other kind or name which shall receive fixed dividends, or is not subject to all the liabilities of all other classes of stock of said associations, except that it shall be lawful for such associations to issue fully paid stock upon the payment by the holder thereof of the par value of such stock upon which the dividends to be declared shall not exceed the sum named in said certificate of stock, but in no event shall the dividend exceed eight per cent. per annum nor the rate of dividend declared upon the other stock of said association, which said stock shall be subject to be called in and redeemed by the said association by giving the holder thirty days' notice thereof. But such stock shall not be entitled to vote at any stockholders meeting. Any association having heretofore issued stocks forbidden by this section must retire the same on or before January 1st, 1901, and the same may be retired either by paying the amount due thereon in cash or by the issuing of stock permitted to be issued by the provisions of this section. [28 G. A., ch. 69, § 1.]

**SEC. 1898-d. Foreclosure of mortgage—costs.** In case of foreclosure of any mortgage given by a shareholder of any such association, the mortgagor shall be charged with the rate of interest agreed upon, not however to exceed eight per cent. per annum, and shall be entitled to be credited, as of any anniversary of said mortgage, with the total amount of all payments made on the stock to the said association during the preceding year, and such payment on the stock shall be treated as a payment upon the mortgage, anything in the articles of incorporation or the by-laws of such association to the contrary notwithstanding. If such association shows affirmatively that losses have occurred during the period of the membership of such shareholder in excess of the amount of any fund accumulated from which to pay such losses, to such an extent that the value of the shares of stock have been impaired, then such associations shall be entitled to have entered as a part of the judgment of foreclosure the equitable contribution of said shareholder toward such losses. If, by the articles of incorporation, the withdrawal value of the stock of such mortgagor is greater than the amount paid thereon, together with eight per cent. interest then such withdrawal value shall be credited on the mortgages of the date to which such value is computed, in lieu of the credits of payment on stock as aforesaid, and judgment and decree shall be rendered for only the balance found due, provided, however, that on any mortgage executed between October 1, 1897, and the date of the taking effect of this act, the rate of interest may be computed at the rate therein named, but in no case at a greater rate than twelve per centum per annum on the net amount of the loan actually received by and paid to the borrower, and no evasion of this provision shall be had by means of any dues, premiums, membership fees, fines, forfeitures, or other charges, any agreement to the contrary notwithstanding. In any suit in which the recovery upon the mortgage shall be for a less amount than the amount demanded in the plaintiff's petition, all costs of suit, including attorney's fees, may in the discretion of the court be taxed to the plaintiff. Provided, further, that in case of foreclosure judgment and decree shall be entered for as much as would be due the association under the provisions of this act if suit had not been brought. [28 G. A., ch. 69, § 6.]

**SEC. 1899-a. Loans—premium and interest.** Such associations shall have power to loan money to their members at such rate as may be agreed upon, and may collect premiums and interest thereon, but in no case shall the amount of premium and interest paid exceed eight per cent. per annum, but nothing herein shall be construed as prohibiting the payment of such interest and premium monthly, or at such time as may be provided for in the articles of incorporation. [28 G. A., ch. 69, § 4.]

**SEC. 1902-a. Expenditures and expenses—compensation of officers and agents.** All expenditures and expenses for management and conducting the affairs of said associations, not including membership fees and charges for closing loans, shall be paid from the receipts of interest, premiums, and other sources of profit. Said associations may thus use for expenses in any one year a sum not in excess of the following percentages on their assets, as shown by the last annual report, to wit: Associations with assets not in excess of \$100,000, three per centum per annum; associations with assets in excess of \$100,000, but less than \$300,000, two and one-half per cent.; associations in excess of \$300,000, and less than \$500,000, two and a quarter per cent.; and associations with assets in excess of \$500,000, two per cent.; but in no event shall the expenses of any association exceed \$12,000 in any one year. No officer, employe, or agent of any association shall receive directly or indirectly any salary or other compensation, except for services actually rendered; and any compensation hereafter paid in violation of this section may be recovered by any shareholder or borrower within three years from the receipt of such illegal compensation from the person accepting the same, or from any officer knowingly consenting to the allowance thereof, in a suit which may be brought in the name of the association, or in the name of such shareholder or borrower. [28 G. A., ch. 69, § 2.]

**SEC. 1903-a. Fines—terms of withdrawal.** Any stockholder in arrears in payments may be fined in a sum not in excess of three cents per share of one hundred dollars each for the first month's delinquency and five cents per share of one hundred dollars each for each succeeding month's delinquency; but said penalty shall only be due and payable from the profits belonging to said delinquent. The terms of withdrawal of a member from such association shall be such that any withdrawing member shall receive a sum not less than he has paid into said association, unless losses have occurred to said association, during the time that said withdrawing member was a member, which exceed the amount of the profits, or any fund created with which to pay such losses, and in that case such withdrawing member shall be charged with his proportionate share of the excess of the losses over the profits, and no more. [28 G. A., ch. 69, § 3.]

**SEC. 1903-b. Withdrawal of non-borrowing members.** The articles of incorporation of any building and loan or building and savings association may, by a three-fourths vote of the board of directors, provide that non-borrowing members shall withdraw their stock at book value in the order of its issue, beginning with the stock first issued, by giving the stockholders thereof thirty days notice. [28 G. A., ch. 69, § 5.]

**SEC. 1906-a. Detailed statement published.** The auditor of state shall publish, in his report of building and loan and savings and loan associations, a detailed statement of the salaries and compensation paid, and to whom, giving the names of the officers and agents respectively receiving such salaries. [28 G. A., ch. 69, § 13.]

**SEC. 1907-a. Voluntary liquidation.** Building and loan or saving and loan associations, by a vote of three-fourths of the shareholders of such associations, represented in person or by proxy, may go into voluntary liquidation upon such plan as shall be determined upon by the shareholders at their meeting. In case any such association resolves to go into voluntary liquidation, it shall have power, after crediting the mortgages given by the

borrowing member with the full book value of the stock, to sell and assign such mortgage to a similar building and loan association, or to any other parties who will hold the same upon the terms under which such mortgage was given to the association. In that event the said mortgage shall be held to become due, if no other time can be agreed upon between the mortgagor and the association, within three years after the assignment thereof. In case the shareholders are unable to agree upon other plan and terms upon which the said association may wind up its affairs, the following plan shall be adopted. Interest shall be computed on the respective amounts paid in by the several shareholders from the date of such payments until the date that said association resolves to go into liquidation, and amount so found shall be the basis for distribution of the assets of the association. In the case of a borrowing member the amount thus found due him on stock, if there have been no losses so as to impair the capital, shall be credited on his mortgage and the balance of such mortgage shall be paid within one year together with interest at the rate therein agreed upon not to exceed 8 per cent. and upon the payments of the outstanding mortgages and the conversion of the assets into money the same shall be distributed *pro rata* among the stockholders according to the amount found due each as aforesaid. And any balance due the borrowing member, over and above the amount actually received as a credit on the mortgage, shall be paid to such members. In case, however, of an impairment of the capital by loss, the amount of such loss shall be estimated and apportioned to each member *pro rata* according to the amount found due such members in the manner aforesaid, and the borrowing members shall be entitled to receive a credit on their mortgages for the balance after the stock is charged with its *pro rata* share of the loss, and the balance due on such mortgages shall be paid within twelve months, and upon the final distribution any balance due such borrowing member shall be paid to him. But in the final distribution, before the final dividend is made, interest shall be allowed on the amount found due the non-borrowing member not to exceed six per cent. so as to equalize between the borrowing member who has received a credit on his mortgage and the non-borrowing member. Any plan other than that herein specified shall be submitted to the executive council for approval before the same is adopted. [28 G. A., ch. 69, § 7.]

**SEC. 1907-b. Consolidation with other companies.** Any building and loan or savings and loan association organized under the laws of this state shall have authority to consolidate its business and membership with one or more building and loan or savings and loan associations of the same class organized under the laws of this state and to transfer to such association or associations its entire assets subject to its existing liabilities, and upon the consolidation of such associations, if any one or more of said companies shall have heretofore issued guaranty stock, they may provide for the withdrawal and retirement of said guaranty stock, and the same may be withdrawn in accordance with the plan therein adopted. The plan of such consolidation, when approved by the board of directors of each of the associations, shall be reduced to writing and submitted to the executive council, and if they find that the plan is in conformity with the law, and equitable in all respects to the members of both associations, they shall attach thereto their certificate of approval. Such plan shall then be submitted to the members of both associations, either at the regular meetings or at special meetings called for that purpose, and, if approved by a vote of three-fourths of the shares of stock of each association, the same shall then be filed in the office of the auditor of state, who shall issue a certificate authorizing the consolidation. At such meetings the members may vote in person or by proxy or by written ballot mailed or otherwise delivered to the secretary at or before the time of meeting. [28 G. A., ch. 69, § 8.]

**SEC. 1907-c. Consolidation when in hands of receiver.** In any case where a receiver has been appointed for any such association, its membership and business may in like manner be consolidated with, and its assets transferred to, another such association of the same class, but in such case the receiver shall act in place of the board of directors, and the plan must also be approved by the court by which the receiver was appointed. [28 G. A., ch. 69, § 9.]

**SEC. 1908. Foreign companies.**

Prior to any specific provisions as to foreign associations, such an association might do business in the state upon complying with the law relating to foreign corporations generally. *Tootle v. Singer*, 88 N. W., 446.

This section implies that foreign corporations are to be put upon an equality

with domestic associations of the same character, upon condition only that they comply with the requirements peculiar to them, and held that the act of 27 G. A., chap. 48, legalizing usurious loans by building and loan associations, was applicable to foreign as well as domestic companies. *Ibid.*

**SEC. 1908-a. Foreign companies.** No building and loan or savings and loan association, incorporated under the laws of any other state or country, shall be authorized to do business in this state, whose articles of incorporation are not found by the executive council to be in substantial compliance with the laws of this state, and affording equal security and protection to the members thereof. [28 G. A., ch. 69, § 14.]

**SEC. 1915-a. Penalty.** It shall be unlawful for any agent, solicitor, or other person to sell stock or solicit persons to subscribe for stock in any such association named in section 14 hereof, which has not been authorized to do business in this state, and any person convicted of so doing shall be punished by a fine of not less than fifty nor more than two hundred dollars, and shall be committed to the county jail until the fine and costs are paid. [28 G. A., ch. 69, § 15.]

**SEC. 1920-a. Unincorporated building and loan associations—extending provisions of other sections to include what.** All unincorporated organizations, associations, societies, partnerships or individuals conducting and carrying on a business, the purpose of which is to create a fund derived from periodical payments by members of such organizations, associations, societies, or other persons, upon contracts or otherwise, as well as from fines, forfeitures, incidental fees and payment of premiums and interest, which fund is to be loaned or advanced to members of the organization, association, society or to the persons making such periodical payments, for the purpose of enabling them to acquire the ownership or free possession of real estate, or personal property or to construct buildings, or any or all of such purposes, shall be deemed building and loan associations; and the provisions of chapter thirteen (13) of title nine (9) of the code, and chapter sixty-nine (69) of the acts of the twenty-eighth general assembly of the state of Iowa, shall apply to all such building and loan associations so far as the same can be made applicable to unincorporated organizations, associations, societies, partnerships or individuals. [29 G. A., ch. 77, § 1.]

**SEC. 1920-b. Sworn statements—deposit of securities.** Every such unincorporated organization, association, society, partnership or individual, conducting and carrying on the business defined in section one (1) hereof, shall, before transacting any business in this state, submit to the executive council a full and complete sworn statement of the resources and liabilities of such organization, association, society, partnership or individual, and of the proposed plan or method of doing business; and no such unincorporated building and loan association shall be permitted to carry on its business within this state unless it shall first deposit with the auditor of state at least fifty thousand dollars (\$50,000) of first mortgages and negotiable notes in the same amount secured thereby upon real estate in the state of Iowa, bearing

interest at a rate not less than five per cent. per annum, which said mortgages shall in no case exceed one-half the actual value of the real estate upon which they are taken; and the auditor of state shall have power and authority to require that such further amount of such securities shall be deposited with him as in his judgment may thereafter be necessary to protect the members of such building and loan association, or the persons making periodical payments thereto. The notes, mortgages and securities so deposited with the auditor of state shall, with all interest and accumulations thereon, be held in trust by him for the purpose of fulfilling and carrying out all contracts made by such building and loan association with the members thereof, and with the persons making periodical payments thereto. [29 G. A., ch. 77, § 2.]

**SEC. 1920-c. Approval—certificate.** If the executive council approves the plan or method of business of any such building and loan association, it shall endorse its approval upon the statement of the resources and liabilities and plan of business presented to it, and such statement shall thereupon be filed in the office of the auditor of state, who shall issue a certificate to such building and loan association to transact business within the state of Iowa, if such association has deposited with him the mortgages and securities required by the provisions of section two (2) hereof. [29 G. A., ch. 77, § 3.]

**SEC. 1920-d. Officers to give bonds—approval.** Every officer of such building and loan association who signs or endorses checks or handles any of the funds or securities thereof, shall give such bond or fidelity insurance for the faithful performance of his duty in such sum as the auditor of state may require, and no such officer shall be deemed qualified to enter upon the duties of his office until his bond is approved by, and deposited with, the auditor of state. And any such bond may be increased or additional sureties required by the auditor of state whenever in his judgment it becomes necessary to protect the interest of the association or its members, or persons making periodical payments of money thereto, [29 G. A., ch. 77, § 4.]

**SEC. 1920-e. Examination.** The auditor of state may at any time he may see proper make, or cause to be made, an examination of any such building and loan association, or he may call upon it for a report of its condition upon any given day which has passed, as often as four times each year, which report shall contain the information hereinafter required. [29 G. A., ch. 77, § 5.]

**SEC. 1920-f. Expense of examination.** The expense of making such examination shall be paid by the building and loan association, and if made by the auditor in person he shall be paid his necessary expenses only; if made by an examiner designated by the auditor, he shall receive ten dollars (\$10) a day for the time employed by him and his necessary expenses. [29 G. A., ch. 77, § 6.]

**SEC. 1920-g. Annual reports.** On or before the first day of February of each year every such building and loan association shall file with the auditor of state its annual report in writing for the year ending on the thirty-first day of December preceding, giving a complete statement in detail of all of its receipts from all sources, and all disbursements made, during such year, arranged and itemized as may be required by the auditor of state. Such report shall also show the number of members or persons making periodical payments to such association, the number and amount of loans made to such persons, the interest received therefrom, the number and amounts of mortgages, contracts or other securities held by the association, the actual cash value of the real estate securing such mortgages or contracts, the salary paid to each of its officers during the preceding year, the assets and liabilities of the association at the end of the year, and any other matters which in the judgment of the auditor of state may be required to give him full information as to the business transacted by such building and loan association. [29 G. A., ch. 77, § 7.]

**SEC. 1920-h. Failure or refusal to furnish reports.** If any such building and loan association shall fail or refuse to furnish to the auditor of state the report required in the preceding section, the officers or persons conducting the business of such building and loan association shall forfeit the sum of twenty-five dollars (\$25) for each day that such report is withheld, and the auditor of state may maintain an action, jointly or severally, against them in the name of the state to recover such penalty, and the same shall be paid in to the state treasury when recovered by him. [29 G. A., ch. 77, § 8.]

**SEC. 1920-i. Penalties.** If any officer or agent of any such building and loan association, or any person conducting the business thereof, shall knowingly and wilfully swear falsely to any statement in regard to any matter in this act required to be made under oath, he shall be guilty of perjury and punished accordingly. And if any officer, agent or employe of any such association, or any person transacting the business thereof, shall issue, utter or offer to utter, any warrant, check, order, or promise to pay of such association, or shall sign, transfer, cancel or surrender any note, bond, draft, mortgage, or other evidence of indebtedness belonging to such association, or shall demand, collect or receive any money from any member or other person in the name of such association without being authorized so to do; or if any such officer, agent or employe of such association, or any person transacting the business thereof, shall embezzle, convert to his own use, or shall use or pledge for his own benefit or purpose, any moneys, securities, credits or other property belonging to the association, or shall knowingly solicit, transact, or attempt to transact any business for any such association which has not procured and does not hold the certificate of authority from the auditor of state to transact business in this state as provided herein; or shall knowingly make, or cause to be made, any false entries in the books of the association, or shall, with intent to deceive any person making an examination of such association, as herein provided, exhibit to the person making the examination any false entry, paper or statement, he shall be fined in a sum not exceeding ten thousand dollars (\$10,000.00), or imprisoned in the penitentiary not exceeding ten (10) years, or punished by both such fine and imprisonment. [29 G. A., ch. 77, § 9.]

**SEC. 1920-j. Revocation of certificate—receiver.** If any such building and loan association, holding a certificate of authority to transact business within this state issued by the auditor as herein provided, shall violate any of the provisions of this act, or shall fail to deposit with the auditor of state such further amount of mortgages or securities as he may require under section two (2) hereof, the auditor of state shall at once revoke such certificate and notify the executive council of the revocation thereof; and under the direction of the executive council, application shall be made by the attorney-general to the proper court for the appointment of a receiver to wind up the affairs of the association; and in such proceedings the amount due from the borrowing members or persons making periodical payments upon contracts or mortgages given by them, shall be ascertained in the manner provided in section seven (7) of chapter sixty-nine (69) of the acts of the twenty-eighth general assembly; and the amounts owing upon such mortgages or contracts from members of the association or persons making periodical payments thereto, shall be treated and considered as due and payable within a reasonable time, to be fixed by the court after the appointment of a receiver. [29 G. A., ch. 77, § 10.]

## TITLE X.

### OF INTERNAL IMPROVEMENTS

#### CHAPTER 2.

##### OF LEVEES, DRAINS, DITCHES AND WATERCOURSES.

###### SECTION 1939. Supervisors to locate.

[For earlier annotations, see code, page 672.—Ed.]

The power of a board of supervisors to construct ditches and drains under these provisions is not restricted in terms or by necessary inference to territory outside of towns and cities. The presumption must be exercised that the board will have due consideration for the interests of the public within as well as without the limits of such municipal corporation. *Aldrich v. Paine*, 106-461.

###### SEC. 1940. Proceedings—bond—survey—notice.

[For earlier annotations, see code, pages 672-3.—Ed.]

Under § 1208 of the Code of '73 which used the word "adjacent" in describing the owners who are required to petition for a ditch, held, the term applied to owners of land abutting on the improvement, and not the owners of all the land within the congressional subdivision through which it runs. *Wormley v. Board of Supervisors*, 108-232.

###### SEC. 1941. Location—damage.

Even though notice is not in the language of the statute, if it is not so defective that it can be said there is no notice, the action of the board in holding it to be sufficient cannot be collaterally assailed. *Oliver v. Monona County*, 90 N. W., 510.

No express finding that the ditch is necessary or would conduce to the public health, convenience or welfare is required. A finding by the board that all the requirements of the law have been fully complied with is sufficient, there being no requirement that a finding as to the necessity

for the ditch shall be made of record. *Ibid.*

The validity of the establishment of a ditch is not affected by the fact that claims for damages are not made and allowed before such location. The objection is not jurisdictional. *Ibid.*

A landowner who has made claim for damages which has been passed on by the board of supervisors cannot afterwards enjoin the prosecution of the work because the damages allowed are not sufficient. *Ibid.*

###### SEC. 1942. Claim for damages.

If in the construction of a county drain or ditch through the limits of a city or town injury will result to the streets or an additional burden of expense be cast upon the corporation, there would seem

to be no reason why damages might not be claimed by such corporation as well as by the individual owners through whose land the ditch extends. *Aldrich v. Paine*, 106-461.

###### SEC. 1944. Letting work—payment.

One who claims to be the lowest bidder cannot maintain an action of mandamus

to compel the board to award the contract to him. *Vincent v. Ellis*, 88 N. W., 836.

**SEC. 1946. Assessment of costs and damages.** When any levee, ditch, drain, or change of direction of any water course shall have been located and established, as provided in this chapter, or when it shall be necessary to cause the same to be repaired or reopened, the auditor shall appoint three persons, one of whom shall be a competent civil engineer, and two who shall be resident freeholders of the county, not living within the township or townships where the improvement is or is to be located, and

not interested therein or in a like question, nor related to any party whose land is affected thereby, who shall within twenty days after such appointment personally inspect and classify as "dry," "low," "wet," or "swamp" all the land benefited by the location and construction of the improvement, or the repairing or reopening of the same, and shall make an equitable apportionment of the cost, expenses, cost of construction, fees, and damages assessed for the construction of any such improvement, or of repairing or reopening the same, and make report thereof in writing to the board of supervisors; which apportionment shall be assessed among the owners of the land along or in the vicinity of such improvement and to be benefited thereby, in proportion to the benefit to each of them, and levied upon the lands of the owners so benefited in said proportions, and collected in the same manner as other taxes are levied and collected for county purposes; which fund so collected shall be kept separate from other county funds, and shall be paid out only for purposes properly connected with the improvement, on the order of the county auditor, on claims properly certified by the engineer in charge of the improvement as in this chapter provided, or on the order of the board of supervisors. The engineer shall receive for each day's service, while so engaged, five dollars, and the other commissioners shall each receive two dollars per day, to be paid out of the funds so collected. In order to prevent or repair a break in any levee in time of high water, any member of the board of supervisors may at once employ the necessary labor to repair the levee or prevent a break thereof, and the necessary and reasonable expense therefor shall be audited by the board of supervisors and paid from the levee fund. [21 G. A., ch. 139; 19 G. A., ch. 44, § 7; 16 G. A., ch. 140, § 4; C. '73, § 1214.] [29 G. A., ch. 78, § 1.]

[For annotations, see code, page 674.—Ed.]

These statutory provisions practically authorize the creation of a drainage district and the assessment of the expenses for the improvement upon all the property coming within the general benefit involved in the promotion of the public health, convenience and welfare. It is not the proximity of the parcels of land in question to the ditch or the benefit to the parcels from the construction thereof which is the

basis of the assessment, but all the parcels within the drainage district are to be assessed uniformly with the expense in accordance with their general character. The owner is entitled to notice with reference to whether his land is included within the drainage district and this is sufficient to charge him with notice of the subsequent proceedings. *Oliver v. Monona County*, 90 N. W., 510.

#### SEC. 1947. Appeals.

[For earlier annotations, see code, page 675.—Ed.]

The provision of this section that it shall not be competent to show that the lands assessed were not benefited by the improvements pertains exclusively to the remedy, and is applicable, although the statutory provision in force when the tax was levied authorized the property owner to show that his property was not benefited by the

improvements. *Allerton v. Monona County*, 111-560; *Oliver v. Monona County*, 90 N. W., 510.

On an appeal to the district court from an order of the board of supervisors refusing to order the construction of a ditch on an application therefor there is no right to a jury trial. *In re Bradley*, 108-476.

**SEC. 1948. Nuisance.** Any ditch, drain or water course which is now or may hereafter be constructed so as to prevent the surplus and overflow waters from the adjacent land from entering the same, is hereby declared a nuisance, and the same may be abated as such; and the diverting, obstructing, impeding, or filling up of such ditches, drains, or water courses, or breaking down of such levees in any manner by any person, without legal authority, or obstructing or in any manner diverting any part of the site thereof to private use, is hereby declared a nuisance, criminally punishable as such. [21 G. A., ch. 139; 19 G. A., ch. 44, § 7; 16 G. A., ch. 140, § 4; C. '73, §§ 1214, 1216.] [29 G. A., ch. 78, § 2.]

**SEC. 1951. Levees, ditches or drains in public highway—highway along levee.** Levees, ditches, drains and embankments may be located and

constructed within the limits of public highways, on either or both sides of and along the same, to be so built as not materially to interfere with the public travel thereon, by taxation and assessment under the provisions of this chapter, and, when constructed, shall be under the control of the board of supervisors of the county in which they are situated; and it shall have power to grant a right of way thereon to any railway that will maintain them while used by it, subject to any claim for damages against the company in any condemnation proceedings which shall be instituted, and the damages awarded, paid, or secured to be paid before possession shall be given, but the county shall not be required on account thereof or otherwise to keep up such improvements at its expense. The board of supervisors shall have power to establish public highways along and upon any levee built under the provisions of this chapter, provided that when so used the same shall be worked as other highways and so as to at all times maintain its condition as a levee. [20 G. A., ch. 186, § 1.] [29 G. A., ch. 78, § 3.]

[For annotations, see code, page 676.—Ed.]

#### SEC. 1952. Petition for drain—proceedings.

[For earlier annotations, see code page 677.—Ed.]

Where a petition is apparently sufficient jurisdiction of the proceeding cannot be as to the number of signers the action of collaterally assailed. *Oliver v. Monona County*, 90 N. W., 510.

### CHAPTER 4.

#### OF TAKING PRIVATE PROPERTY FOR WORKS OF INTERNAL IMPROVEMENT.

##### SECTION. 1995. By railway—limit of.

[For earlier annotations, see code, page 686-8.—Ed.]

When property has been devoted to public use it cannot be taken and applied to another conflicting public use by the exercise of the power of eminent domain, unless by authority of the legislature expressly given or necessarily implied. But held that land owned by a steamboat company and used for a landing was not so devoted to a public use, the steamboat company having no power to condemn land for public use for such purposes and therefore not being authorized to hold for such purposes exempt from the right of condemnation for purposes authorized by statute. *Diamond Jo Line Steamers v. Davenport*, 114-432.

Held further that the fact that the steamboat company had only an undivided interest in the property would indicate that it

was not held absolutely and as of right to a public use. *Ibid.*

A railroad company undertaking to exercise the privilege of eminent domain is precluded from questioning the constitutionality of the conditions provided by statute for the exercise of such privilege. *Gano v. Minneapolis & St. L. R. Co.*, 114-713.

A railroad cannot acquire by condemnation a strip to exceed one hundred feet in width. *Minneapolis & St. L. R. Co. v. Chicago, M. & St. P. R. Co.*, 88 N. W., 1082.

As the statute does not provide for nor require a preliminary survey or location until the condemnation proceedings are commenced, the company is a trespasser in entering upon land for the purpose of making such preliminary survey, and acquires no rights thereby. *Ibid.*

**SEC. 1998. Additional depot grounds.** Any railway corporation owning or operating or constructing a railway shall have power to condemn lands for necessary additional depot grounds or yards, for additional or new right of way for constructing double track, reducing or straightening curves, changing grades, shortening or re-locating portions of the line, for excavations, embankments, or places for depositing waste earth in the same manner as is provided by law for the condemnation of the right of way. Before any proceedings shall be instituted therefor, the company shall apply to the railway commissioners, who shall give notice to the land owner, and examine

into the matter, and report by certificate, to the clerk of the district court in the county in which the land is situated, the amount and description of the additional lands necessary for such purposes, present and prospective, of such company; whereupon the company shall have the power to condemn the lands so certified by the commissioners. [20 G. A., ch. 190, § 1.] [28 G. A., ch. 70, § 1.] [29 G. A., ch. 79, § 1.]

[For earlier annotations, see code, page 688.—Ed.]

The right of way which may be taken for railroad purposes is limited to one hundred feet, whether acquired by condemnation or by purchase. Additional right of way for depot grounds can be acquired only by application to the railroad

commissioners who shall, after a hearing, certify to the district court the amount and description of additional land necessary for that purpose. *Crandall v. Des Moines N. W. R. Co.*, 103-384.

### SEC. 1999. Manner of condemnation.

[For earlier annotations, see code, pages 689-695.—Ed.]

**Measure of damages.** In condemnation proceedings the damages are to be assessed once for all, and when once assessed they include all the injuries which may result for all time to come from the construction and operation of the road in a reasonable and proper manner. *Hileman v. Chicago G. W. R. Co.*, 113-591.

Additional tracks and side tracks, as they may become necessary, may be constructed without the payment of additional damages for right of way. *Ibid.*

Many of the considerations that tend to affect the value of town property are prospective only, but they may nevertheless be taken into account. Therefore where land was condemned for depot purposes, held, that its prospective increased value on account of the location of the depot in that locality might be considered. *Snouffer v. Chicago & N. W. R. Co.*, 105-681.

**Entire premises.** The damages allowed on condemnation of a portion of the owner's premises should include damage to the entire premises resulting from the construction of the improvement which involves the taking of his land. *Haggard v. Independent School Dist.*, 113-486.

Two tracts connected by a right of way may constitute one farm, damage to the whole of which is to be considered in proceedings to condemn a right of way across one portion. *Westbrook v. Muscatine, N. & S. R. Co.*, 88 N. W., 202.

In the assessment of damages it is error to limit the witnesses to a consideration of any special use for the land. The owner is entitled to have his farm valued as a whole, and his damages assessed on that

basis. *Lough v. Minneapolis & St. L. R. Co.*, 89 N. W., 77.

When separate tracts, one only of which is crossed by a right of way, is adapted to one use, and both are especially valuable because of adaptability to that use and are both injuriously affected by the appropriation they should be treated as constituting one property in assessing the damages. *Hoyt v. Chicago, M. & St. P. R. Co.*, 90 N. W., 724.

Whether the owner of separate parcels is entitled to have them treated as one tract is usually a question for the jury. But where the tracts are entirely independent, not contiguous, and there is no evidence that damage to the part actually taken affects the part not touched the court should direct the jury to consider only that tract over which the right of way is taken. *Ibid.*

**Payment to sheriff.** Nothing short of actual payment, or its equivalent, to the owner of the damages assessed constitutes compensation for property wrested from him under the power of eminent domain. Payment of the damages to the sheriff is not effectual where the sheriff becomes insolvent and the property owner is unable to secure the money paid. *Burns v. Chicago, Ft. M. & D. M. R. Co.*, 110-385.

The deposit with the sheriff of the amount of the award is intended as security for the land owner where the company takes immediate possession of the land and the land owner has such an interest in the deposit when made that he may hold the officer liable for its safe keeping. *Bannister v. McIntire*, 112-600.

### SEC. 2007. Costs.

[For earlier annotations, see code, page 697.—Ed.]

The provisions of this section allowing attorney's fees in such proceedings is not unconstitutional. *Gano v. Minneapolis & St. L. R. Co.*, 114-713; *Lough v. Minneapolis & St. L. R. Co.*, 89 N. W., 77.

By the provisions of Code § 884 the proceedings provided for under this section are to be followed in condemning land by a city. *Mellichar v. Iowa City*, 90 N. W., 86.

**SEC. 2009. Appeals—how taken.**

[For earlier annotations, see code, pages 697-9.—Ed.]

Where the land owner alone appeals from the award, the company is the defendant in such sense as to be entitled to remove the case to the federal court without regard to which party made the application for the appointment of commissioners. *Kirby v. Chicago & N. W. R. Co.*, 106 Fed., 551.

Where land is condemned and taken possession of before the damages are paid, interest should be allowed on the amount of the award. *Lough v. Minneapolis & St. L. R. Co.*, 89 N. W., 77.

**SEC. 2011. Trial—judgment—costs.**

[For earlier annotations, see code, pages 699-700.—Ed.]

Payment to the sheriff does not limit the property owner to his remedy against the sheriff for the recovery of money thus paid. *Burns v. Chicago, Ft. M. & D. M. R. Co.*, 110-385.

The court should not on appeal render judgment against the company for the damages found where the property has not been appropriated. *Haggard v. Independent Sch. Dist.*, 113-486.

**SEC. 2015. Non-user of right of way.**

[For earlier annotations, see code, page 701.—Ed.]

Where the right of the company to land taken for right of way is lost by non-user the land does not revert to the original owner from whom it was taken, but to the present owner of the tracts of land from which it was taken. *Smith v. Hall*, 103-95.

It is to be questioned whether this section is meant to apply to a grant of the use of a public highway, but at any rate it does not apply to restrict a railroad company from using a right of way acquired over a public highway alongside a right of way acquired over private property whenever it shall see fit to avail itself of such right. *Morgan v. Des Moines U. R. Co.*, 113-561.

By agreement a land owner may be entitled to enforce a forfeiture of the railroad right of way in case of abandonment although the length of time of non-user contemplated by the statute has not expired. *Gill v. Chicago & N. W. R. Co.*, 90 N. W., 606.

Use of the right of way over the owner's land which is merely colorable and not for ordinary railroad purposes will not prevent such forfeiture. *Ibid.*

It is not necessary to constitute such abandonment that the entire line of which the right of way in question forms a part shall have been abandoned. *Ibid.*

**SEC. 2016. Condemning abandoned right of way.**

[For earlier annotations, see code, page 701.—Ed.]

After the lapse of eight years of non-user, the right of way ceases to exist as such, and is to be again acquired by exercise of the power of eminent domain in the same manner as rights of way are obtained in the first instance. And in such

case the provision that parties who have previously received compensation, which has not been refunded shall not be permitted to recover the second time, has no application. *Remy v. Iowa Cent. R. Co.*, 89 N. W., 218.

**SEC. 2017. Raising or lowering highways.**

[For earlier annotations, see code, pages 701-2.—Ed.]

A railroad company may cross streets in the occupation of a right of way acquired over private property without the consent of abutting property owners, if in crossing such streets its track is not laid in front of the property of such abutting owners. *Morgan v. Des Moines U. R. Co.*, 113-561.

Under the evidence in a particular case held that the railroad took its grant of right of way subject to existing easements in favor of the public. *Chicago, R. I. & P. R. Co. v. Council Bluffs*, 109-425.

And held that, having recognized and adopted a dedication of highways to the public by the original proprietor, a mere non-use by the public of such highways would not defeat the same. *Ibid.*

Land devoted to the use of a railroad is devoted to public use and a common highway may be used by a railroad company without further compensation to adjoining owners. *Burlington Gas Light Co. v. Burlington, C. R. & N. R. Co.*, 165 U. S. 370.

**SEC. 2020. Crossing railways, canals, etc.**

[For earlier annotations, see code, page 703.—Ed.]

Where the right of one road to cross another has been acquired under existing

statutes, the legislature cannot, by a subsequent statute, impose as a condition to the

continued use of such crossing the burden of paying the entire cost of putting in and operating an interlocking system. *Manhattan Trust Co. v. Sioux City & N. R. Co.*, 81 Fed., 50.

But by Code § 2063 a railway proposing to cross one already constructed must bear the expense of interlocking. *Minneapolis & St. L. R. Co. v. Cedar Rapids, G. & N. W. R. Co.*, 114-502.

### SEC. 2022. Private crossings.

[For earlier annotations, see code, pages 703-5.—Ed.]

Where an open crossing would be dangerous in the operation of a railway and a closed crossing is all that the land owner is reasonably entitled to demand, he cannot complain that an open crossing has been discontinued and gates have been constructed. *Aistrope v. Tabor & N. R. Co.*, 75 N. W., 334.

The fact that an under passageway is contracted in width after it has been occupied and used for a long period does not entitle the property owner to damages if such passageway is left of sufficient width to fulfill the objects for which it was originally provided. *Oliver v. Burlington, C. R. & N. R. Co.*, 111-221.

A land owner cannot acquire a right to a crossing by adverse possession so as to preclude change thereof by the company. *Schrimer v. Chicago, M. & St. P. R. Co.*, 87 N. W., 731.

An undercrossing, constructed in pursuance of the statute, and not by contract with the owner, may be changed by the

company to a grade crossing when no peculiar damage results to the owner by the change and the expense of maintaining the undercrossing would be unreasonable. *Ibid.*

In condemnation proceedings it is proper for the jury to take into account the fact that an adequate crossing over the track is required by statute to be constructed, and that if only an underground crossing would be adequate, such a crossing will be given. *Lough v. Minneapolis & St. L. R. Co.*, 89 N. W., 77.

The railroad company is required to build and maintain cattle guards within a reasonable time after having been properly requested. The request must be of some officer or agent of the company, acting within the scope of his duties, such duties including the management or control of the putting in of cattle guards, or of ordering them to be put in. *McGill v. Minneapolis & St. L. R. Co.*, 113-358.

## CONDEMNATION OF REAL ESTATE FOR INSTITUTIONS OF THE UNITED STATES.

**SEC. 2024-a. State to condemn.** Whenever, in the opinion of the governor of the state, the public interest requires the laying or construction of any drain, sewer or aqueduct, and the acquisition of an easement therefor, upon or across private property, or the taking of any real estate for the making or construction of any drain, sewer or aqueduct, or for rifle ranges, exercise, drill or parade grounds, yards, walls, buildings or other improvements or conveniences for the use or benefit of any fort, arsenal, military post or other institution of the United States, upon or across private property, the same proceedings may be had in the name of the state as are provided for the taking of private property for works of internal improvement by chapter 4, title X, of the code, and the proceedings shall be conducted by the county attorney of the county in which the land is situated, whenever directed by the governor, or he may appoint some other person for that purpose. [29 G. A., ch. 83, § 1.]

**SEC. 2024-b. Damages certified—how paid—conveyance of title.** When the amount of the damages is finally determined, the sheriff or clerk, as the case may be, shall certify the amount thereof to the governor who shall, by an order endorsed thereon, direct the payment of the same, including all costs and expenses incurred, and the auditor of state shall issue a warrant on the treasury for the amount, which shall be paid out of such money as may have been deposited in the treasury by the United States, or by any person or persons for and on its behalf, and when paid to the sheriff or person entitled thereto, the governor and auditor of state are hereby authorized and instructed to convey the easement or real estate so taken and all of the rights of the state so acquired therein, to the United States, by good and sufficient deed of conveyance executed for, on behalf of and in the name of the state of Iowa, and thereupon the United States, through its

proper officer or agent, may enter upon the premises and construct the desired work. [29 G. A., ch. 83, § 2.]

**SEC. 2024-c. United States may purchase or condemn.** That where the United States of America has undertaken or may hereafter undertake to improve any river, stream, or water-course, forming a part of the boundary line of this state, or within this state, or to utilize any river, stream, or water-course, for any purpose, deemed advisable, the said United States may purchase, or condemn land and private property, in accordance with the provisions of chapter four (4) title ten (10) of the code, for taking private property. [29 G. A., ch. 80, § 1.]

**SEC. 2026. Street railways over highways.** Any corporation organized under the laws of this state to operate a street railway in any city or town may, for the purpose of extending its railway beyond the limits thereof, locate, build and operate, by animal or other power, its road over and along any portion of the public road which is one hundred feet or more wide. It shall as soon as practicable put the road in as good repair as it was before its use for such railway. Boards of supervisors are authorized to accept for road purposes conveyances of land adjoining any such road or part thereof sufficient to increase the same to the width of one hundred feet; but in any county in which such company desires to operate its line of railway over a road not less than sixty feet in width, for a distance not over two miles, beyond the limits of a city or town to any state institution, the board of supervisors may grant the right to it to operate its line over said road, not exceeding two miles, under such rules and regulations as said board may prescribe. The board shall have the power to rescind or modify such grant, rules and regulations at any time. Where an interurban railway desires to operate its lines along or upon a public highway, and in the opinion of the board of supervisors of the county in which such highway is located, it is impracticable or inexpedient to increase the width thereof to one hundred (100) feet, such board of supervisors may permit such interurban railway company to construct and operate its railway along and upon such highway, under such restrictions and regulations as the board may deem advisable; but no such railway shall construct or operate its line along or upon such highway until a written statement of consent of three-fourths of the residents owning property abutting upon such highway shall have been obtained and filed with the auditor of the county in which the highway is located. And in all cases the location, construction and operation of such interurban railway shall be subject to the provisions of section two thousand and twenty-seven (2027) of the code. [18 G. A., ch. 32, § 1.] [29 G. A., ch. 81, § 5.]

The provisions of the act from which this section is derived related entirely to street railways and a street railway which is thus extended beyond the city limits along the public highway to a neighboring city

or town does not become subject to taxation under the provisions relating to taxation of railroads. *Cedar Rapids & M. C. R. Co. v. Cedar Rapids*, 106-476.

**SEC. 2028. Ways to lands which have none.** Any person, corporation or copartnership owning or leasing any land not having a public or private way thereto, may have a public way to any railway station, street or highway established over the land of another, not exceeding forty feet in width, to be located on a division line or immediately adjacent thereto; but if a railway is to be constructed thereon, as provided in section two thousand and thirty-one (2031) the same may be located wherever necessary and practicable, but not exceeding one hundred feet in width, and not interfering with buildings, orchards, gardens or cemeteries; and when the same shall be constructed it shall, when passing through inclosed land, be fenced on both sides by the person or corporation causing it to be established. [25 G. A., ch. 18; 15 G. A., ch. 34, § 1.] [29 G. A., ch. 82, § 1.]

## CHAPTER 4-A.

## OF INTERURBAN RAILWAYS.

**SECTION 2033-a. Interurban railway defined.** Any railway operated upon the streets of a city or town by electric or other power than steam, which extends beyond the corporate limits of such city or town to another city, town or village, or any railway operated by electric or other power than steam, extending from one city, town or village to another city, town or village, shall be known as an interurban railway, and shall be a work of internal improvement. [29 G. A., ch. 81, § 1.]

**SEC. 2033-b. What statutes apply.** The words railway, railway company, railway corporation, railroad, railroad company, and railroad corporation, as used in the code and acts of the general assembly, now in force or hereafter enacted, are hereby declared to apply to and include all interurban railways, and all companies or corporations constructing, owning or operating such interurban street railways, and all provisions of the code and acts of the general assembly, now in force or hereafter enacted, affecting railways, railway companies, railway corporations, railroads, railroad companies and railroad corporations, are hereby declared to affect and apply in full force and effect to all interurban railways, and to all interurban railway companies or railway corporations constructing, owning or operating such interurban railways. [29 G. A., ch. 81, § 2.]

**SEC. 2033-c. When a street railway.** Any interurban railway shall, within the corporate limits of any city or town, or of any city acting under a special charter, upon such streets as it shall use for transporting passengers, mail, baggage, and such parcels, packages, and freight as it may carry in its passenger or combination baggage cars only, be deemed a street railway, and be subject to the laws governing street railways. [29 G. A., ch. 81, § 3.]

**SEC. 2033-d. Powers of cities and towns.** Cities and towns and cities acting under special charters, shall have power to authorize or forbid the construction of such railways upon, or over, or along the streets, alleys and public grounds within their limits and to prescribe the conditions and regulations under which said railways shall be constructed and operated within said limits. But the right to operate as a street railway under section three (3) of this act shall not be granted for a period exceeding twenty-five (25) years. Nothing herein shall impair the obligation of contracts of such city or town heretofore made. This act shall not in any manner affect sections seven hundred and seventy-five (775) and seven hundred and seventy-six (776) of the code, which shall be applicable to interurban railways. [29 G. A., ch. 81, § 4.]

**SEC. 2033-e. Grade-crossings—duties of employes—penalty.** Wherever the tracks of an interurban railway cross the tracks of any steam railway at grade the steam railway shall have the right of way and not be compelled to stop its trains and the interurban railway company operating said line shall cause its cars to come to a full stop not nearer than ten (10) feet nor further than fifty (50) feet from such crossing, and before proceeding to cross said steam railway tracks shall cause some person in its employ first to cross said track ahead of said car or cars and ascertain if the way is clear and free from danger for the passage of said interurban cars, and said interurban cars shall not proceed to cross until signalled to do so by such person employed as aforesaid, or said way is clear for such passage over said tracks. Every person in charge of any interurban car or cars, who wilfully fails to comply with the provisions hereof and fails to bring the car or cars which he has in charge to stop, or causes the same to cross said steam railway tracks before the way is clear or he is signalled to do so, shall be subject to a fine of not less than one hundred dollars (\$100.00) nor more than two

hundred dollars (\$200.00) or imprisonment in the county jail not to exceed twelve (12) months in the discretion of the court. No steam railway shall obstruct the free passage of the cars of an intersecting interurban railway at such crossing. [29 G. A., ch. 81, § 6.]

## CHAPTER 5.

### OF THE CONSTRUCTION AND OPERATION OF RAILWAYS.

#### SECTION. 2036. May join or consolidate.

[For earlier annotations, see code, page 708.—Ed.]

A lease of railroad property for a long period of time is not void under the statutory provision against the creation of perpetuities. *Sioux City Terminal R. & W. Co. v. Trust Co.*, 82 Fed. 124; *First Nat. Bank v. Sioux City Terminal R. & W. Co.*, 69 Fed., 441.

### OF THE PURCHASE OR CONTROL OF RAILROADS IN OTHER STATES.

**SEC. 2038-a. Powers in other states.** That any railroad corporation organized under and by virtue of the laws of this state and owning and operating a railroad therein shall be authorized and empowered to exercise in any other state or territory of the United States in which it may control or operate a connecting line or lines of railway the powers and privileges conferred upon it by its articles of incorporation and all powers, privileges and franchises conferred upon railroad corporations under and by virtue of the laws of Iowa or of such other state or territory, for the purposes set forth in section two hereof. [29 G. A., ch. 84, § 1.]

**SEC. 2038-b. May purchase, lease, control or operate.** That any railroad corporation so organized under the laws of Iowa and owning and operating a railroad therein may lease, purchase, or otherwise acquire and own, control or operate any connecting extension of its said railroad not parallel or competing therewith, in any other state or territory of the United States, and to that end may purchase and control the stock, bonds or securities of any such extension if not contrary to the laws of such other state or territory. [29 G. A., ch. 84, § 2.]

#### SEC. 2039. Duties and liabilities of lessees.

[For earlier annotations, see code, page 709.—Ed.]

A special assessment on railway property for improvement of abutting streets cannot be collected directly from the lessee where the lessee has not undertaken to pay such assessment. *Chicago, R. I. & P. R. Co., v. Ottumwa*, 112-300.

#### SEC. 2041. Bonds—mortgages.

By statute the company has express authority to mortgage after-acquired property, and by that statutory provision, when the power to mortgage exists, the right to incumber after-acquired property is necessarily included. *Beach v. Wakefield*, 107-567.

#### SEC. 2042. After-acquired property.

The statute expressly authorizes any corporation organized under the state law for the purpose of constructing and operating a railway, to mortgage its franchise and all its property, whether acquired before or after the execution of the mortgage. *Sioux City Terminal R. & W. Co. v. Trust Co.*, 82 Fed., 124.

#### SEC. 2043. Execution of mortgages.

[For earlier annotations, see code, page 710.—Ed.]

A railroad company in many respects purely a private corporation, and it may bind itself by an ultra vires mortgage, which is not against public policy, by accepting and retaining the benefits thereof. *Beach v. Wakefield*, 107-567.

**SEC. 2054. Cattle-guards—crossings—signs.**

[For earlier annotations, see code, pages 712-4.—Ed.]

Where an animal had gone upon the right of way over a defective cattle-guard and had afterwards escaped across such guard to the highway and was there killed, held, that it did not necessarily appear that it was not killed by reason of the defective cattle-guard, and that the company might be liable. *Riley v. Chicago, M. & St. P. R. Co.*, 104-235.

In an action to recover damages resulting to an employe by reason of a defective cattle-guard, a plea of contributory negligence may be quite different from an allegation in the petition that plaintiff was free from contributory negligence. *Ford v. Chicago, R. I. & P. R. Co.*, 106-85.

**SEC. 2055. Failure to fence—liability for stock killed—speed at depots.**

[For earlier annotations, see code, pages 715-724—Ed.]

**Fences and cattle-guards.** The fact that the railroad company allows a portion of its right of way to remain open for use of the public as a highway does not relieve it from liability for stock killed on such portion of its right of way where it does not appear that the dedication of such portion of the right of way to the public has been accepted by it. *Sarver v. Chicago, B. & Q. R. Co.*, 104-59.

The fact that fencing would involve a cattle-guard at the place where a spur track leaves the main track does not constitute an excuse for not maintaining a fence at such place. *Kingsbury v. Chicago, M. & St. P. R. Co.*, 104-63.

The issue under a general denial in an action to recover for injuries to stock on a right of way raises simply the question whether the company has the right to fence its right of way at the point involved, and not the question whether it has a legal excuse for not so doing. *Ibid.*

There is no liability for a failure to fence unless the injury is caused thereby. *Norman v. Chicago & N. W. R. Co.*, 110-283.

Where a cattle-guard is defective by reason of being filled up with sand and gravel so that animals may readily pass over the same from the highway to the portion of the right of way which is fenced, the company is liable for killing such animals on the fenced portion of the right of way after they have passed thereon from the highway. *Pothast v. Chicago G. W. R. Co.*, 110-458.

It is the track, and not the right of way, which is required to be fenced, and where the track was laid on a bridge, and the right of way under the bridge was left unfenced, and cattle passed through from an adjoining field under the bridge onto the highway, and were killed at the highway crossing, held that the railroad company was not liable by reason of the want of a fence. *Cagwin v. Chicago & N. W. R. Co.*, 113-175.

Evidence in a particular case held sufficient to sustain a verdict against a railroad company for killing of stock by reason of a defective fence. *Kling v. Chicago, M. & St. P. R. Co.*, 88 N. W., 355.

**Negligence.** Where the track is enclosed for a long distance each way from the

place of accident and train men have no reason to expect that stock will be on the right of way at such place, there is no duty owed to the owner of the stock until their presence is discovered, and then the company owes only the duty of using ordinary care to avoid injury to such stock. *Mears v. Chicago & N. W. R. Co.*, 103-203.

Where a gate at a crossing is such as is commonly in use and is in good order, and the railroad company is not negligent in keeping it closed, it will not be liable for stock killed on the right of way going thereon through such gate, unless it is negligent in the operation of its trains with reference to such stock. *Ibid.*

**Negligence of owner.** The mere fact that the owner knows that a gate separating his premises from the right of way is broken down will not as a matter of law preclude his recovery for killing of his animals which go upon the right of way through such gate. Contributory negligence alone will not defeat the owner's recovery. *Enix v. Iowa Central R. Co.*, 114-508.

**Defective fence.** The finding in a particular case that stock got on the right of way through a defective gate held sufficiently supported by evidence indicating that the gate was liable to come open by reason of the action of the wind. *Huss v. Chicago G. W. R. Co.*, 113-342.

**Double damages.** Where the notice and affidavit were sufficient to put the railroad company upon inquiry, which, if diligently pursued, would have led to a discovery of the facts concerning plaintiff's claim, held that that was sufficient, although there was a discrepancy between them. *Bramner v. Wabash R. Co.*, 112-375.

**Speed at depot grounds.** Liability for injury to stock on account of operating trains on the depot grounds at a greater rate of speed than eight miles per hour where no fence is built, is limited to stock running at large and is not applicable to stock driven by and under the control of the owner or his servant. *Strever v. Chicago & N. W. R. Co.*, 106-137.

[The last reference in the notes to this section in the original Code is erroneous. It should be *Schurr v. Omaha & St. L. R. Co.*, 91-418.]

**SEC. 2056. Damages by fire.**

[For earlier annotations, see code, pages 724-7.—Ed.]

**Presumption; burden of proof.** The fact that fire is set out by sparks from an engine creates a presumption of negligence on the part of the railroad company which may be overcome by proof that it was not guilty of negligence. *Swanson v. Keokuk & W. R. Co.*, 89 N. W., 1088; *Krejci v. Chicago & N. W. R. Co.*, 90 N. W., 708.

The provision of this section throwing the burden of proof on the company to escape liability from loss due to fires is not applicable to fires set out by section men on the right of way. *Connors v. Chicago & N. W. R. Co.*, 111-384.

**Measure of damages.** Where one's meadow has been destroyed he is entitled to recover its value, which may be ascertained by finding what it would cost to reproduce or restore it. The rule is different as to the destruction of trees. *Bradley v. Iowa Central R. Co.*, 111-562.

The rule of damages for the destruction of a hedge is the difference in value of the

entire farm of plaintiff before and after its destruction, and the value of the hedge may be taken into account in determining the amount of the injury. *Swanson v. Keokuk & W. R. Co.*, 89 N. W., 1088; *Thompson v. Keokuk & W. R. Co.*, 89 N. W., 975.

In such case plaintiff is entitled to recover the value of the grass destroyed, as well as the expense of restoring the meadow. *Ibid.*

In case of the destruction of a meadow, the value of the meadow burned may be determined by comparison with the condition of the remainder of the meadow at the time of the trial. *Ibid.*

When trees, shrubs or meadow are destroyed the measure of damages is at least the difference in value between the land as it was before injury and its value afterward and the loss of rental value on account of the loss. *Krejci v. Chicago & N. W. R. Co.*, 90 N. W., 708.

**SEC. 2063. Proposed crossing.**

Where a railroad about to be constructed is to cross one already constructed, the former must bear the expense of interlocking. *Minneapolis & St. L. R. Co. v. Cedar Rapids, G. & N. W. R. Co.*, 114-502.

The right to use a crossing already established cannot be made to depend upon payment of the entire cost of an interlocking system. *Manhattan Trust Co. v. Sioux City & N. R. Co.*, 81 Fed., 50.

**SEC. 2064. Apportionment of costs.**

The provisions of this section as to apportionment relate only to the costs of the proceedings, and not to the expense of

the interlocking device. *Minneapolis & St. L. R. Co., v. Cedar Rapids, G. & N. W. R. Co.*, 114-502.

**SEC. 2066. Sale or lease of railroad property—joint arrangement.**

[For earlier annotations, see code, page 729.—Ed.]

A railway may contract with connecting lines to carry beyond its line, subject only to the qualification that under such agree-

ment arbitrary rates cannot be fixed which are discriminatory in their nature. *Bras v. Burlington, C. R. & N. R. Co.*, 114-401.

**SEC. 2071. Liability for negligence or wrongs of employes.** Every corporation operating a railway shall be liable for all damages sustained by any person, including employes of such corporation, in consequence of the neglect of the agents, or by any mismanagement of the engineers or other employes thereof, and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers or other employes, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding. Nor shall any contract of insurance, relief, benefit, or indemnity in case of injury or death, entered into prior to the injury, between the person so injured and such corporation, or any other person or association acting for such corporation, nor shall the acceptance of any such insurance, relief, benefit, or indemnity by the person injured, his widow, heirs, or legal representatives after the injury, from such corporation, person, or association, constitute any bar or defense to any cause of action brought under the provisions of this section, but nothing contained herein shall be construed to prevent or invalidate any settlement for damages

between the parties subsequent to injuries received. [C. '73, § 1307.] [27 G. A., ch. 49, § 1.]

[For earlier annotations, see code, pages 730-733.—Ed.]

In general. The company is not liable to an employe for an injury done by a co-employe when it would not have been liable to a third person injured by a like act. *Kincade v. Chicago M. & St. P. Ry.*, 107-682.

This section makes no pretense of fixing the degree of negligence which will entitle an injured person to recover. It does not render the company liable to a trespasser for injuries received, unless due to wilful wrong or gross negligence. *Earl v. Chicago, R. I. & P. R. Co.*, 109-14.

The object of this provision is to relieve employes from the fellow servant rule, and it does not give to the widow the right to sue for damages sustained by her by reason of the death of her husband, occasioned by the wrongful act of a railroad company. *Major v. Burlington, C. R. & N. R. Co.*, 88 N. W., 815.

Operation of the railroad. One employed in the construction of a bridge is engaged in the operation of the road in such sense as that the company will be liable for injuries to him caused by negligence of the foreman in allowing a train to go upon the incomplete bridge, the foreman having been provided with a flag for the purpose of enabling him to control the operation of trains over such bridge. *Keatley v. Illinois Cent. R. Co.*, 103-282.

An employe operating a hand car is engaged in the operation of the road. *Larson v. Illinois Cent. R. Co.*, 91-81.

The peculiarity of the railroad business which distinguishes it from any other is the movement of vehicles or machinery of great weight on the track by steam or other power and the dangers incident to such movement are those the statute was intended to guard against. If, then, the injury is received by an employe whose work exposes him to the hazards of moving trains, cars, engines, or machinery on the

track, and is caused by the negligence of a co-employe in the actual movement thereof, or in any manner directly connected therewith, the statute applies and recovery may be had. Beyond this the statute affords no protection. *Akeson v. Chicago, B. & Q. R. Co.*, 106-54.

Therefore, held, that an employe in a railroad coal house, who was injured by the negligence of a co-employe in shoving back a plank over which coal had been carried to fill the tender of a live locomotive, was so engaged in the operation of the railroad as to be entitled to recovery for negligence of the co-employe. *Ibid.*

The statute contemplates such injuries only as are caused by the negligent acts of employes engaged in the movement of the engines, cars and machinery on the track, or directly connected therewith. Therefore, held, that the handling of a derrick in coaling an engine was not within the contemplation of the statute. *Reddington v. Chicago, M. & St. P. Ry.*, 108-96.

A railroad is only operated, within the meaning of the law, by moving trains, cars, engines, or machinery on the track. *Connors v. Chicago & N. W. R. Co.*, 111-384.

This section held applicable to injuries sustained by a car cleaner working in a standing car on a side track, which was run into by an engine by reason of the negligence of a hostler in charge of such engine. *Jensen v. Omaha & St. L. R. Co.*, 88 N. W., 952.

Where an employe was assisting in transferring railroad rails from one car to another by means of power furnished by the operation of a locomotive engine, held that he was so engaged in the hazardous business of operating railways as to be entitled to recover for injuries received through the negligence of a co-employe. *Stebbins v. Crooked Creek R. & C. Co.*, 90 N. W., 355.

## SEC. 2072. Signals at road crossings.

[For earlier annotations, see code, page 734.—Ed.]

Before there can be a recovery on account of negligence of the railway company in failing to give statutory signals, or for running at an exceedingly high rate of speed at a highway crossing, it must be shown that the person suffering injury from such negligence did not contribute to the injury by negligence on his own part, and he cannot in all cases rely upon the railway company to give the signals required by statute. A person possessing the ordinary powers of seeing and hearing cannot, without negligence on his part, knowingly approach a railway crossing and fail to discover an approaching train which he can readily see or hear within sufficient

length of time to enable him, with reasonable effort, to avoid danger. *Crawford v. Chicago G. W. R. Co.*, 109-433.

The statutory signals are intended for the protection, as far as possible, of animals as well as men, and a failure to give such signals when approaching a crossing makes the company absolutely liable for injuries to stock on the crossing, provided it appears that if such signals had been given they would have prevented the animals going on the track or frightened them away from the crossing. *Graybill v. Chicago, M. & St. P. R. Co.*, 112-738; *McGill v. Minneapolis & St. L. R. Co.*, 113-358.

It is for the jury to determine whether the signals were given as required, and if not, whether the failure to give them was the cause of the injury to the animals. *Ibid.*

The requirements of state statutes and city ordinances are not the sole standards for determining whether due care has been observed by the railroad company to guard against accidents at a crossing. *Kowalski v. Chicago G. W. R. Co.*, 84 Fed., 586.

Where there is no ordinance requiring the blowing of a whistle within city or town limits it may be omitted. *Pratt v. Chicago, R. I. & P. R. Co.*, 107-287.

Testimony of witnesses that they did not hear the crossing whistles sounded does not even create a conflict with positive evidence that the signals were given at the whistling

posts. *Payne v. Chicago & N. W. R. Co.*, 108-188.

If the person injured at the crossing would not have heard the signals if given, then the omission to give them will not render the company liable. *Ibid.*

Evidence of persons in a situation to hear, and whose attention was not diverted, that they did not hear a signal which other witnesses testified to having heard, is not merely negative evidence. *Mackerall v. Omaha & St. L. R. Co.*, 111-547.

A railroad company cannot be excused for failure to comply with the provisions of this section on the ground that compliance would amount to an interference with interstate commerce. *Willfong v. Omaha & St. L. R. Co.*, 90 N. W., 358.

### SEC. 2074. Contract or rule limiting liability.

[For earlier annotations, see code, pages 734-5.—Ed.]

A railroad company contracting for the carriage of goods beyond the end of its line may, in the contract with reference to such carriage, limit its liability, notwithstanding the provisions of this section. *Hartley v. St. Louis, K. & N. W. R. Co.*, 89 N. W., 88.

It may be stipulated that stock is to be in charge of the shipper or his agent while in transit, free transportation being furnished to such person, and that the shipper assumes the duty of loading and unloading, attending to, feeding and watering such stock at his own expense and risk. In case damage results from lack of care in these respects on the part of the shipper or his agent the company will not be liable unless the loss is due to the failure of the company to discharge duties not assumed and undertaken by the shipper. *Grieve v. Illinois Cent. R. Co.*, 104-659.

The burden is on the shipper in the first instance to show in such case that injury to stock from want of care did not result from his own negligence and if occasioned by failure to do what he has undertaken then that such failure resulted from the omission on the part of the company to perform some duty devolving upon it. *Ibid.*

### SEC. 2075. Lien of judgment.

[For earlier annotations, see code, page 735.—Ed.]

Sec. 1309 of Code of '73 had no application to street railways. *Fidelity Loan & Trust Co. v. Douglass*, 104-532.

A pending right of action against a railroad, which is not reduced to judgment be-

A contract between a railroad company and the shipper of stock by which the latter is to have the entire charge and care of the stock and the company is not to be liable for damages for failing to feed and water, is not void under the statute as a contract limiting liability. *Burgher v. Chicago, R. I. & P. R. Co.*, 105-335.

The case of *Solan v. Chicago, M. & St. P. R. Co.*, 95-260, is affirmed on appeal to U. S. supreme court. *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S., 133.

A limitation of liability for a horse to \$100, named in the contract as "the release value of the horse," held invalid under the provisions of this section. *Lucas v. Burlington, C. R. & N. R. Co.*, 112-594.

As a railroad company may absolutely refuse to check as baggage of a passenger that which is merchandise, it may, notwithstanding the provisions of this section, make any regulations in regard to the waiver of such condition which it sees fit to adopt. *Weber Co. v. Chicago, St. P., M. & O. R. Co.*, 113-188.

The case of *Griswold v. Illinois Cent. R. Co.*, 90-265, followed in a case involving a similar state of facts. *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.*, 175 U. S., 91.

fore the sale of the property under mortgage foreclosure, is not preserved by this section. *Winter v. Iowa Cent. R. Co.*, 111-342.

### SEC. 2077. Maximum rates of fare.

[For earlier annotations, see code, pages 736.—Ed.]

Plaintiff suing for wrongful ejection from a train for the refusal to pay ten cents additional on account of not having a ticket has the burden of alleging facts to show that he could not have procured a ticket

within a reasonable time before the departure of the train upon which he took passage. *Bowsher v. Chicago, B. & Q. R. Co.*, 117-16.

**SEC. 2077-a. Bulletins posted.** It shall be the duty of all railway companies on all lines of railway operated by them, to keep posted in the waiting room of each passenger station, a bulletin plainly showing the time of arrival and departure at such station of all trains carrying passengers. [29 G. A., ch. 87, § 1.]

**SEC. 2080. Automatic couplers.** After January 1st, 1898, no corporation, company or person, operating a railroad, or any transportation company using or leasing cars, shall have upon any railroad in this state any car that is not equipped with such safety automatic coupler: Provided that the board of railroad commissioners shall have power upon a showing which it shall deem reasonable, to extend the time within which any such corporations shall be required to comply with the provisions of this section; but no such extension shall be made beyond January 1st, 1900. [23 G. A., ch. 18, § 2.] [27 G. A., ch. 50, § 1.]

**SEC. 2083-a. Exempt from liability.** That no corporation, company, or person shall be liable to any prosecution in any court of this state for any fines or penalties incurred under the provisions of section two thousand and eighty-three (2083) of the code in so far as the same relates to the operation of cars not equipped with safety automatic couplers only, as provided by section twenty hundred and eighty (2080) of the code, from the first day of January, 1898, up to and including the time of taking effect of this act; and every such corporation, company, or person shall be, and is hereby, released from all criminal prosecution, penalties, fines, and forfeitures for failure to have cars equipped with such safety automatic couplers during such period. [27 G. A., ch. 51, § 1.]

**SEC. 2083-b. Pending litigation.** This act shall in no manner affect pending litigation. [27 G. A., ch. 51, § 2.]

#### TAXES IN AID OF RAILROADS.

**SEC. 2084. May be voted.** Taxes not exceeding five per cent. on the assessed value of any township, town or city may be voted to aid any railway company, trolley or electric railway which is or may become incorporated under the laws of the state, to aid in the construction of a projected railroad or any trolley or electric railway within the state, as hereinafter provided. [25 G. A., ch. 27; 24 G. A., ch. 18; 20 G. A., ch. 159, § 2.] [29 G. A., ch. 85, § 1.]

[For annotations, see code, page 738.—Ed.]

[By section 2, chapter 85 of the acts of the 29th G. A., the provisions of the above section and other sections are extended and made applicable to trolley or electric railways, and the words "railroad," "railroad company" or "railway company" are made to include "trolley or electric railway company." See section 2091-a, *infra*.—Ed.]

**SEC. 2085. Petition—notice—submission—certificate—levy—collection.** When a petition is presented to the trustees of any township or the council of any town or city, signed by a majority of the resident freehold taxpayers of such township, town or city, asking that the question of aiding any railroad company incorporated under the laws of the state in the construction of a projected railroad within it be submitted to the voters thereof, it shall be the duty of the trustees or council, as the case may be, immediately to give notice of a special election, by publication in some newspaper printed in said township, town or city, if any there be, and, if not, then in some newspaper published in the county, and also by posting copies of said notice in five public places in such township, town or city at least ten days before such election, which shall state the time and place of holding the same, the name of the company, and the line of the road proposed to be aided, the rate per cent. of the tax to be levied, whether one-half thereof shall be collected

the first year and one-half the following year, or whether the whole is to be collected in one year, the amount of work required to be done and when and where the same shall be done, to what point said railroad shall be fully completed, and any other conditions which shall be performed before such tax or any part thereof shall become due; and in no case shall such tax become due until such railroad is fully completed according to the conditions in said notice. The trustees or council, as the case may be, shall cause to be prepared the form of the proposition to be submitted. The proposition shall be printed and placed upon the ballots and the election shall be conducted in the same manner as provided with respect to like or similar propositions in the chapter on elections; and if a majority of the votes polled be for the adoption of the proposition, then the clerk of the township, city or town, or the clerk of election, shall forthwith certify to the county auditor the result thereof, the rate per cent. of tax voted, the year or years during which the same is to be collected, the name of the company to which voted, and the time, terms and conditions upon which the same, when collected, is to be paid under the conditions and stipulations in said notice, together with an exact copy of the notice under which the election was held, which the county auditor shall at once cause to be recorded in the office of the recorder of deeds; the expense thereof, and of publishing the notice, and all the expenses of the election, shall be paid by the railway company to which it is proposed to vote the tax. When such certificate has been made and recorded, the board of supervisors of the county shall, at the time of levying the ordinary tax next following, levy such taxes as are voted under the provisions hereof, as shown by said certificate, and cause the same to be placed on the tax lists of the proper township, town or city, indicating in their order thereupon when and in what proportion the same are to be collected, and upon what conditions the same are to be paid to the railway company, a certified copy of which order shall accompany the tax lists. The taxes shall be collected at the time or times specified in the order, and in the same manner, and subject to the same laws after they are collectible, as other taxes, or as may be stated in the petition and notices for the election, except as otherwise provided. [20 G. A., ch. 159, § 3.]

[For earlier annotations, see code, pages 739-743.—Ed.]

[By section 2, chapter 85, of the acts of the 29th G. A., the provisions of the above section and other sections, are extended and made applicable to trolley or electric railways, and the words "railroad," "railroad company" or "railway company" are made to include "trolley or electric railway company." See section 2091-a, *infra* —Ed.]

A condition in the proposition for voting a tax that the railroad shall be operated in connection and solely with a certain other specified railroad system for a specified time and in active competition with other specified roads does not render the taxes invalid. *Bras v. Burlington, C. R. & N. R. Co.*, 114-401.

Printing of surplusage on the ballot will not necessarily render the election invalid. *Ibid.*

In a particular case held that the form of ballot was sufficient, and was not calculated to mislead the voter in expressing his views. *Ibid.*

**SEC. 2086. Notice—conditions—limit of tax.** The stipulations and conditions in the notices prescribed in this chapter must conform to those set forth in the petition asking for the election; and the aggregate amount of tax voted in any city, town or township shall not exceed five per cent. of the assessed value of the property therein, respectively. The right to vote taxes within the limits herein provided shall exist after the expiration of ten (10) years from the exercise to the limit of the right herein granted. Nothing herein shall authorize a tax of five per centum within such period named to steam railroads and also five per centum within such period to interurban railways. [25 G. A., ch. 27; 24 G. A., ch. 18; 20 G. A., ch. 159, § 4.] [29 G. A., ch. 86, § 1.]

[For annotations, see code, page 743.—Ed.]

[By section 2, chapter 85 of the acts of the 29th G. A., the provisions of the above section and other sections, are extended and made applicable to trolley or electric railways, and the words "railroad," "railroad company" or "railway company" are made to include "trolley or electric railway company." See section 2091-a, *infra*.—Ed.]

**SEC. 2087. Money paid out—certificate.** The moneys collected under the provisions of this chapter shall be paid out by the county treasurer to the treasurer of the railway company for whom the same was voted, upon the orders of the president or managing director thereof, at any time after the trustees of such township or council of such town or city voting the same, or a majority thereof, shall have certified to the county treasurer that the conditions required of the railway company and set forth in the notice for the special election have been complied with, which certificate said township trustees or council of such town or city shall make when conditions have been sufficiently complied with to entitle the railway company thereto, or when the conditions are fully complied with on the part of the railway company; but if the costs and expenses of holding the election and of recording the certificates have not been paid, then the treasurer shall first deduct from the moneys collected the amount thereof, and pay same to the parties entitled thereto. [20 G. A., ch. 159, § 5.]

[For annotations, see code, pages 743, 744.—Ed.]

[By section 2, chapter 85 of the acts of the 29th G. A., the provisions of the above section and other sections, are extended and made applicable to trolley or electric railways, and the words "railroad," "railroad company" or "railway company" are made to include "trolley or electric railway company." See section 2091-a, *infra*.—Ed.]

**SEC. 2088. Certificates of taxes exchangeable for stock or bonds.** The county treasurer when required shall, in addition to a tax receipt, issue to each taxpayer, on the payment of any taxes voted under the provisions of this chapter, a certificate showing the amount of tax paid, the name of the railway company entitled thereto, and when the same was paid; and he may charge twenty-five cents for each certificate issued. Said certificates shall be assignable, and, when presented by any person holding the legal title thereto to the president, managing director, treasurer or secretary of the railroad company receiving the taxes paid, as shown by such certificates, in sums of one hundred dollars or more of taxes, it shall issue or cause to be issued to said person the amount of stock of the company desiring the benefit from said taxes, to the amount of said certificate or certificates, and if the taxes paid as shown by said certificate or certificates amount in the aggregate to more or less than any certain number of shares of stock, then the holder thereof shall be entitled to receive the full number of shares of stock covered by said certificates, and may make up in money the balance of any share when the certificates held by him are not equal to one full share of such stock, which stock for such purpose shall be estimated at par. When it shall be proposed in the petition and notice calling an election to issue first mortgage bonds not exceeding the sum of eight thousand dollars per mile for a railroad of three feet gauge, and not exceeding the sum of eighteen thousand and five hundred dollars per mile for the ordinary four feet eight and one-half inch gauge in lieu of stock, it shall be lawful to issue bonds of the denomination of one hundred dollars, in the same manner as is provided for the issue of stock, and in such case the petition and notice shall state the amount of bonds per mile to be issued, the rate of interest, and the time of payment of the interest and principal thereof. [23 G. A., ch. 19, § 1; 20 G. A., ch. 159, § 6.]

[For annotations, see code, pages 744, 745.—Ed.]

[By section 2, chapter 85 of the acts of the 29th G. A., the provisions of the above section and other sections are extended and made applicable to trolley or electric railways, and the words "railroad," "railroad company" or "railway company" are made to include "trolley or electric railway company." See section 2091-a, *infra*.—Ed.]

**SEC. 2089. Liability of directors.** The board of directors of any railway company receiving taxes voted in aid thereof under the provisions of this chapter or any member thereof, who shall vote to bond, mortgage or in any manner incumber said road to an amount exceeding the sum of eight thousand dollars per mile for a railroad of three feet guage, or exceeding the sum of eighteen thousand five hundred dollars per mile for the ordinary four feet eight and one-half inch guage, not including in either case any debt for ordinary operating expenses, shall be liable to the stockholders or either of them for double the amount, estimated at its par value, of the stock by him held, if the same should be rendered of less value or lost thereby. [23 G. A., ch. 19, § 2; 20 G. A., ch. 159, § 7.]

[For annotations, see code, page 745.—Ed.]

[By section 2, chapter 85 of the acts of the 29th G. A., the provisions of the above section and other sections, are extended and made applicable to trolley or electric railways and the words "railroad," "railroad company" or "railway company" are made to include "trolley or electric railway company." See section 2091-a, *infra*.—Ed.]

**SEC. 2090. Forfeiture of tax.** Should the taxes voted in aid of any railroad under the provisions of this chapter remain in the county treasury for more than one year after the same have been collected, the right to them by the railroad company shall be forfeited, and the persons who paid the same entitled to receive back from the county treasurer their *pro rata* shares thereof remaining, and in all cases where any taxes have been voted or levied upon the real or personal property in any township, town or city to aid in the construction of any railroad, and the road in aid of which they were voted or levied has not been built, completed or operated into or through such township, town or city, it shall be the duty of the board of supervisors of the county where said taxes have been voted and levied and still remain on the tax books to give the railway company in aid of which the tax was voted at least thirty days' notice in writing, to be served like original notices, of their intention to cancel such taxes, and thereupon to cause the same to be canceled and stricken from the tax books of the county, which cancellation shall remove all liens created by the levy thereof. In all cases where the railway company to whom taxes have been voted neglects or refuses to receive such taxes, or to require or permit the same to be collected and certificates therefor to be issued, for the period of one year after they become due and collectible, and in all cases where taxes have been voted in aid of any railroad, and the conditions upon which the same were voted have not in fact been complied with, and the time in which said conditions were to be fulfilled has expired, the same shall be forfeited, and the county officers of the county in which they have been levied and entered upon the tax books shall enter cancellation thereof upon the proper records; and in all cases where any taxes to aid in the construction of any railroad may be voted upon the inducement or promise offered on the part of said railroad company, or any duly authorized agent thereof, for any rebates or exemptions from said tax or any part thereof, or any agreed price to be paid for the stock that may be issued in lieu of said tax, or a division of said tax, or any portion or percentage thereof, with any of the voters or taxpayers as an inducement to procure said tax to be voted, all taxes so procured to be voted shall be void. [20 G. A., ch. 159, § 8.]

[For annotations, see code, page 746.—Ed.]

[By section 2, chapter 85 of the acts of the 29th G. A., the provisions of the above section and other sections are extended and made applicable to trolley or electric railways, and the words, "railroad," "railroad company" or "railway company" are made to include "trolley or electric railway company." See section 2091-a, *infra*.—Ed.]

**SEC. 2091. Taxes paid in labor or supplies.** Nothing contained in this chapter shall preclude any taxpayer who may contract with a railroad company for which taxes may be voted to pay his tax, or any part thereof,

in labor upon the line of said railroad, or in material for its construction, or supplies furnished or money paid for the construction thereof, in pursuance of the terms and conditions stipulated in the notices of election, in lieu of a payment to the county treasurer. Upon presenting to the county treasurer a receipt from such railroad company or its duly authorized agent, specifying the amount of such payment, the same shall be credited by the treasurer on his tax, with the same effect as though paid to him in money, and when such receipts have been presented and credited they shall have the same validity in his settlement with the board of supervisors as the orders from the railroad company provided for in this chapter. Laborers shall have a lien upon any tax voted in aid of a railroad company for the amount due them for labor performed in the construction of said railroad. [Same, § 9.]

[For earlier annotations, see code, page 746.—Ed.]

[By section 2, chapter 85 of the acts of the 29th G. A., the provisions of this section and of other sections, are extended and made applicable to trolley or electric railways, and the words "railroads," "railroad company" or "railway company" are made to include "trolley or electric railway company." See section 2091-a, *infra*.—Ed.]

The lien here provided for in favor of laborers is not a mechanic's lien, nor is it a common law lien. Neither possession nor filing of a statement or claim is essen- *tial. Kent v. Muscatine, N. & S. R. Co., 88 N. W., 935.* Such a lien is assignable. *Ibid.*

**SEC. 2091-a. What statutes apply.** All of the provisions of sections two thousand and eighty-four, two thousand and eighty-five, two thousand and eighty-six, two thousand and eighty-seven, two thousand and eighty-eight, two thousand and eighty-nine, two thousand and ninety, and two thousand and ninety-one of the code are hereby made applicable to trolley or electric railways. And wherever the word "railroad" appears in any of said sections the same shall be held to include trolley or electric railroad; and wherever the words "railroad company" or "railway company" appear in said sections the same shall be held to include trolley railway company, and electric railway company. Provided, that no stock shall be issued by any such company except upon payment therefor of the full par value thereof in cash or its equivalent. [29 G. A., ch. 85, § 2.]

#### SEC. 2100. Powers.

The corporation provided for in this section is not a railroad company. But a railroad company may, irrespective of this section, construct a union depot, and in so doing it does not lose any of the powers possessed by it under the general law. *Morgan v. Des Moines U. R. Co., 113-561.*

A railroad company may purchase and own such right of way as it sees fit, and use it in connection with the operation of a union depot without securing the consent of the railroad commission. *Ibid.*

## CHAPTER 7.

### OF THE REGULATION OF CARRIERS BY RAILWAY.

#### SECTION. 2124. Unjust discrimination.

[For earlier annotations, see code, page 754.—Ed.]

The provision of 22 G. A., chap. 28, in relation to unjust discriminations and the punishment therefor, held applicable to cases wherein railway companies voluntarily fixed joint rates, irrespective of provi-

sions of 23 G. A., chap. 17 (Code §§ 2152-2157) relating to the fixing of schedules of joint rates by the railroad commissioners. *Blair v. Sioux City & P. R. Co., 109-369.*

**SEC. 2128-a. Common carriers to redeem tickets.** It shall be the duty of every railroad company, corporation, person or persons acting as common carriers of passengers in the state of Iowa, to provide for the redemp-

tion, at the place of purchase and at the general passenger agent's office of said carrier of the whole or any integral part of any passenger ticket or tickets that such carrier may have sold, as the purchaser or owner has not used for passage or received transportation for which such ticket should have been surrendered; and said carrier shall there redeem the same at a rate which shall equal the difference between the price paid for the whole ticket and the cost of a ticket between the points for which said ticket has been actually used, and no carrier shall limit the time in which redemption shall be made to less than ten days from date of sale at the place of purchase and six months from date of sale at general passenger agent's office. [28 G. A., ch. 71, § 1.]

**SEC. 2128-b. Notice posted.** No railroad company, corporation, person or persons doing business in the state of Iowa, as common carrier of passengers, whose rate of fare is regulated by statute of this state, shall sell or issue to any person, at the maximum rate allowed by law, any ticket or tickets bearing any condition of limitation as to the time of use, or as to transferability, without first providing for the redemption of said ticket, as directed by the preceding section hereof, and also having notice of such provision and privilege of redemption conspicuously posted at each place where sales of tickets are made by such common carriers in this state. A failure to provide for the redemption of such ticket or to give notice as above provided shall make all conditions and limitations as to time of use or transferability of no force or effect. [28 G. A., ch. 71, § 2.]

**SEC. 2128-c. Penalty.** Any railroad company, corporation, person or persons, who as common carriers shall sell or issue tickets as set forth in the preceding sections, and shall refuse or neglect to redeem the same, as by said sections provided, within ten days of date of demand, shall forfeit and pay to the owner of such ticket the purchase price of said ticket, and the further sum of one hundred dollars. [28 G. A., ch. 71, § 3.]

**SEC. 2128-d. Mileage books.** Nothing in this act shall prohibit the sale of mileage books or tickets, at less than the maximum rates allowed by law, bearing reasonable conditions of limitation, as to the right of use for passage. [28 G. A., ch. 71, § 4.]

#### **SEC. 2130. Penalty in treble damages.**

[For earlier annotations, see code, page 757.—Ed.]

The penalty of treble damages authorized in case recovery is had for unlawful discrimination in rates should not be increased by allowing interest on the damages thus awarded. *Blair v. Sioux City & P. R. Co.*, 109-369.

#### **SEC. 2145. Discrimination—punishment.**

When joint rates are established between all the points on two or more lines of road, if within the state, extortion and discrimination are prohibited. *Blair v. Sioux City & P. R. Co.*, 109-369.

#### **SEC. 2152. Joint rates.**

When two or more companies enter into an agreement for joint rates, which agreement covers all stations upon the line in any given state, they virtually create a new and independent line, and become subject to the law preventing unjust discrimination and unreasonable exaction. *Blair v. Sioux City & P. R. Co.*, 109-369.

The corresponding section of 23 G. A., chap. 17, held not unconstitutional. *Ibid.*

# TITLE XI.

## OF THE MILITIA.

### CHAPTER 1.

#### OF THE MILITIA.

**SECTION 2168-a. Repeal—Iowa national guard.** That section twenty-one hundred and sixty-eight (2168) of the code of Iowa is hereby repealed and the following enacted in lieu thereof: The active militia shall be designated "Iowa National Guard" hereafter referred to as "the guard," recruited by volunteer enlistments and shall consist of four regiments of infantry, one signal company, and, at the discretion of the commander-in-chief, of two batteries of artillery and two troops of cavalry and the necessary staff departments, with such other officers and enlisted men as are hereinafter prescribed. [29 G. A., ch. 88 § 1.]

**SEC. 2169-a. Repeal—governor to call out.** That section twenty-one hundred and sixty-nine (2169) of the code is hereby repealed and the following enacted in lieu thereof: When a requisition shall be made by the president of the United States for troops, the governor, as commander-in-chief, shall order into service the national guard of the state, or such portion thereof as may be necessary, and if insufficient, so many of the militia as is required, designating the same by draft, if a sufficient number shall not volunteer, and shall organize and commission officers therefor; and while so in the service the national guard and militia shall be subject to the same regulations and receive the same compensation and subsistence as the Army of the United States receive. [29 G. A., ch. 88, § 2.]

**SEC. 2173-a. Repeal—enlistments.** That section twenty-one hundred and seventy-three (2173) of the code of Iowa is hereby repealed and the following is enacted in lieu thereof: All enlistments therein shall be for three years and re-enlistments if within thirty days from date of discharge, for one, two or three years as the soldier may elect, and made by signing the enlistment prescribed by the adjutant-general and taking the following oath or affidavit which may be administered by the enlisting officer, to wit: "You do solemnly swear [or affirm] that you will bear true allegiance to, and that you will support the constitution of the United States and that of the state of Iowa, and will, as a member of the national guard, serve the United States and the state of Iowa faithfully through your term of service, unless sooner discharged, and that you will obey the orders of the commander-in-chief and such officers as may be placed over you, and the laws and regulations governing the military forces." [29 G. A., ch. 88, § 3.]

**SEC. 2174. Staff of commander-in-chief.** The staff of the commander-in-chief shall consist of an adjutant-general, quartermaster-general, inspector-general, commissary-general, a surgeon-general, a judge-advocate-general, a general inspector of small arms practice, a chief of engineers, a chief signal officer, a military secretary, and seven aides, who shall have served in the regular or volunteer service of the United States or the Iowa National Guard, not less than one year, provided this section shall not apply to appointments heretofore made. They shall be appointed and commissioned by the commander-in-chief, and shall hold office until their successors are appointed and commissioned. The adjutant-general shall have rank of brigadier-general. In time of piece, the chiefs of departments shall have rank of colonel, the military secretary shall have rank of major, and

the aides shall have rank of colonel. [26 G. A., ch. 102, § 8; 24 G. A., ch. 31, § 4; 22 G. A., ch. 82, § 43; 18 G. A., ch. 74, § 11.] [29 G. A., ch. 88, § 4.]

**SEC. 2175. Adjutant-general.** The adjutant-general shall issue and transmit all orders of the commander-in-chief, and shall keep a record of appointments, of all officers commissioned by the governor, of all general and special orders and regulations, and of such matters as pertain to the organization of the military force and his duties. He shall reside at the capital and hold his office at the pleasure of the governor, and shall perform the duties of quartermaster-general. He shall have charge of the state arsenal and grounds, and receive and issue all ordnance stores and camp equipments on the order of the commander-in-chief. The adjutant-general shall furnish at the expense of the state such blanks and forms as shall be approved by the commander-in-chief. He shall in each odd-numbered year make out a detailed report for the preceding two years of the transactions of his office, the expenses thereof, and such other matters as shall be required by the governor, who may at any time require a similar report. [26 G. A., ch. 102, § 9; 24 G. A., ch. 31, § 4; 22 G. A., ch. 82, § 43; 18 G. A., ch. 74, § 11.] [29 G. A., ch. 88, § 5.]

**SEC. 2176-a. Repeal—adjutant-general—compensation.** That section twenty-one hundred and seventy-six (2176) of the code is hereby repealed and the following is enacted in lieu thereof:

“When a requisition shall be made by the president of the United States for troops upon the state, the adjutant-general shall also act as quartermaster-general and as full compensation as adjutant-general and acting quartermaster-general shall receive a salary from the state the compensation of grade of colonel of the army during the time said troops are in the service.” [28 G. A., ch. 72, § 2.]

**SEC. 2178. Regimental staff—band.** The regimental staff shall be appointed and commissioned by the governor on recommendation of the regimental commander, and shall consist of an adjutant, with rank of captain; a chaplain, with rank of captain; a quartermaster, with rank of captain; a commissary of subsistence, with rank of first lieutenant; and an adjutant, with rank of first lieutenant for each battalion. The commander of each regiment shall appoint by warrant, countersigned by the adjutant, the non-commissioned staff, consisting of a regimental sergeant-major, and a sergeant-major for each battalion, a quartermaster-sergeant, a commissary-sergeant, a color-sergeant, an ordnance-sergeant, and a chief trumpeter. The commissions of regimental staff officers shall expire when the officer nominating them, or his successor, shall make new nominations for their respective offices, and such nominations shall be confirmed by the commander-in-chief. Each regimental commander may cause to be enlisted and organized a band composed of a chief musician, two principal musicians, a drum major, and not more than twenty privates, under the leadership of such chief musician. The members of such bands shall be subject to the same regulations as other enlisted men. The regimental commander, on the recommendation of the captain, shall appoint the non-commissioned officers of each company, by warrant countersigned by the adjutant. [26 G. A., ch. 102, §§ 12, 13; 24 G. A., ch. 31, § 6; 20 G. A., ch. 65, § 2; 18 G. A., ch. 74, § 13.] [28 G. A., ch. 72, § 9.]

**SEC. 2179-a. Repeal—company and troop—officers.** That section twenty-one hundred and seventy-nine (2179) of the code as amended by the twenty-eighth general assembly is hereby repealed and the following enacted in lieu thereof: A company of infantry shall consist of a captain, a first lieutenant, a second lieutenant, one first sergeant, one quartermaster-sergeant, four sergeants, six corporals, two cooks, two musicians and not less than forty nor more than sixty-four privates and non-commissioned officers.

A signal company shall consist of one captain, two first lieutenants, two second lieutenants, one first sergeant, eight sergeants, sixteen corporals, two cooks, two musicians and not less than forty nor more than sixty-four privates and non-commissioned officers. A troop of cavalry or a battery of light artillery shall have the same officers and non-commissioned officers as an infantry company and one farrier, one blacksmith and one saddler. In time of war or public danger the commander-in-chief may increase enlisted strength of such companies as he may deem necessary equal to those of the regular army. The company officers shall be elected by the officers and enlisted men of the company and shall hold office for five years unless their resignation shall have been accepted or they are dismissed by sentence of court-martial. [29 G. A., ch. 88, § 6.]

**SEC. 2180. Elections of officers.** All elections of company officers shall be ordered by the regimental commander. All elections of field officers shall be ordered by the commander-in-chief. Such orders shall be sent to the commanding officer of the company in which said election is ordered, who shall issue his order for such election, giving at least six days' notice thereof, by posting in three public places accessible to the members of his command, and, where practicable, the same shall be published in one or more newspapers in the county where said company is located. All voting shall be in person and by ballot, and a majority of all votes cast shall elect. The senior officer present at such election shall preside. The returns of elections attested by the presiding officer shall be made within five days from the date thereof to the commanding officer of the regiment, who shall promptly forward the same through military channels to the adjutant-general, who, upon approval of the commander-in-chief, shall issue commissions accordingly. At the organization of a new company, the election shall be conducted under such regulations as the adjutant-general shall prescribe. [26 G. A., ch. 102, § 15; 24 G. A., ch. 31, § 8; 18 G. A., ch. 74, § 15.] [28 G. A., ch. 72, § 4.]

**SEC. 2181-a. Repeal—medical and staff departments.** That section twenty-one hundred and eighty-one (2181) of the code be repealed and the following enacted in lieu thereof:

The medical department, in addition to the surgeon-general, shall consist of a deputy surgeon [general] with rank of lieutenant-colonel; one surgeon, with rank of major, and an assistant surgeon for each regiment, and an additional assistant surgeon for each twelve-company regiment. Assistant surgeons for the first five years of commission shall have rank of first lieutenant; after which they shall have rank of captain. The enlisted men of medical department shall consist of a hospital steward for each regiment and one acting hospital steward for each regiment, and one acting hospital steward for each assistant surgeon, and such number of privates as the commander-in-chief may prescribe. The other staff departments, in addition to the heads of the departments and personal aides and regimental staff, shall be as follows; an assistant inspector-general, with rank of major; an assistant [general] inspector of small arms practice, with rank of major; and an inspector of small arms practice, with rank of captain; an engineer officer, with rank of first lieutenant; [a signal officer, with rank of first lieutenant,] for each regiment; and such non-commissioned officers and enlisted men, as the commander-in-chief may prescribe, for engineer [and signal] departments. The commander-in-chief shall detail the officers and enlisted men of the staff department for duty with the regiments upon recommendation of their respective chiefs. All staff officers except heads of departments, aides to the commander-in-chief, [and] regimental staff, shall be appointed and commissioned by the commander-in-chief for five years on the recommendation of the chiefs of their respective departments selected by examination

under such rules as the chiefs may prescribe. [28 G. A., ch. 72, § 5.] [29 G. A., ch. 88, § 7.]

[The words "general" enclosed in brackets were attempted to be inserted at these respective points and the words "a signal officer, with rank of first lieutenant," and the words "and signal" enclosed in brackets were intended to be stricken out by section 7, chapter 82, acts of 29th G. A. but there is so much uncertainty about what was done, that I simply enclose the words in brackets, calling attention to the act attempting to change said section.—Ed ]

**SEC. 2199. Military board.** An examining board of three or more competent officers, appointed by the commander-in-chief, shall convene at such times and places as he shall direct, whose duty it shall be to examine into the capacity, qualifications, propriety of conduct and efficiency of commissioned officers or any person who shall have been elected or appointed, who shall be ordered before it, and, upon the report of said board, if adverse to such officer and approved by the commander-in-chief, the commission of such officer shall be vacated, or the commission withheld. No officer shall be eligible to sit on such board whose rank of promotion would in any way be affected by the proceedings, and two members at least shall be of equal or superior rank to the officer examined. If any officer shall refuse to report himself before said board when directed, the commander-in-chief may, upon the report of such refusal by such board, vacate his commission. [26 G. A., ch. 102, § 34; 24 G. A., ch. 31, § 14; 18 G. A., ch. 74, § 35.] [29 G. A., ch. 88, § 8.]

**SEC. 2203. Allowance for headquarters.** There shall be allowed annually for postage, stationery and office incidentals to each regimental headquarters the sum of twenty-five dollars, and to each company headquarters the sum of ten dollars. [26 G. A., ch. 102, § 38; 18 G. A., ch. 74, § 40.] [28 G. A., ch. 72, § 6.]

**SEC. 2204. Allowance for company and band.** There shall be allowed annually to each company and band for armory rent, fuel, lights and like necessary expenses, the sum of three hundred dollars, or so much thereof as may be necessary, to be paid under such regulations as the commander-in-chief may prescribe. [26 G. A., ch. 102, § 39; 24 G. A., ch. 31, § 17; 18 G. A., ch. 74, § 41.] [29 G. A., ch. 89, § 1.]

**SEC. 2211. Repeal—compensation of adjutant-general and assistants.** That section twenty-two hundred and eleven (2211) of the code, be repealed and the following enacted in lieu thereof:

The adjutant-general shall receive an annual salary of two thousand dollars in times of peace, and there shall be appointed a record clerk in the adjutant-general's office, who shall have charge of the war records under direction of the adjutant-general, who shall receive a salary of twelve hundred dollars per annum, and such assistants shall be employed in the adjutant-general's and quartermaster general's department as shall, in the opinion of the commander-in-chief be actually necessary, and any person so employed shall receive for the time actually and necessarily on duty such compensation as the commander-in-chief may prescribe. [28 G. A., ch. 72, § 7.]

**SEC. 2212. Compensation of officers and men.** The military force, when in the active service of the state in time of insurrection or invasion or immediate danger thereof, shall be paid the following compensation for every day actually on duty: Each field and staff officer, four dollars; every other commissioned officer, two dollars and fifty cents; every non-commissioned officer, two dollars; every other enlisted man, one dollar and fifty cents; and necessary transportation, subsistence and quarters; the same to be paid out of any money especially appropriated for that purpose. When in actual service of the state in case of riot, tumult or breach of the peace or imminent danger thereof, pursuant to the order of the governor, they shall receive the

same compensation, transportation, subsistence and quarters, to be paid out of the state treasury, and for such services rendered upon the call of the sheriff, they shall receive the same compensation, transportation, subsistence and quarters, to be paid from the treasury of such county; claims being audited and allowed in the former cases by the executive council, and in the latter by the board of supervisors, at its next session. [26 G. A., ch. 102, § 51; 18 G. A., ch. 74, §§ 7-8.] [28 G. A., ch. 72, § 8.]

[For annotations, see code, page 777.—Ed.]

**SEC. 2213. Compensation during encampments.** For the time spent in each annual encampment or drill, compensation to be paid under such provision as the commander-in-chief may direct, and graded according to length of continuous service therein, shall be allowed as follows: To each officer and soldier of less than three years' continuous service, one dollar per day; to each officer and soldier of more than three years', and less than five years', continuous service, one dollar and fifty cents per day; to each officer and soldier of more than five years' continuous service, two dollars per day. That there shall also be paid to each officer and soldier for attendance at company drill at the company station, the sum of ten cents per hour and not exceeding twenty cents in any one week, provided, that from any money due any officer or soldier for attendance at company drills shall be deducted the sum of ten cents per hour and not exceeding twenty cents in any one week for absence without leave from any such drills. [26 G. A., ch. 102, § 52; 20 G. A., ch. 65, § 4; 18 G. A., ch. 74, § 21.] [28 G. A., ch. 73, § 1.]

**SEC. 2213-a. Warrants—how drawn.** For the purpose of carrying out the provisions of section one of this act the auditor of state is hereby authorized to draw warrants upon the state treasurer upon the certificate of the adjutant-general approved by the governor. [28 G. A., ch. 73, § 2.]

**SEC. 2214. Appropriation.** There is appropriated out of any moneys in the treasury not otherwise appropriated the sum of fifty-seven thousand three hundred and fifty (\$57,350) dollars per annum for the support of the guard under the provisions of this chapter not applying to active service, which shall be drawn by a warrant, drawn by the auditor of state on the state treasurer, upon the certificates of the adjutant-general approved by the governor, showing for what purpose each draft is to be or has been used, and no indebtedness shall be created in excess of such annual appropriation. [26 G. A., ch. 102, § 53; 26 G. A., ch. 103; 20 G. A., ch. 65, § 5; 18 G. A., ch. 74, § 51.] [29 G. A., ch. 89, § 2.]

[For annotations, see code, page 778.—Ed.]

## CHAPTER 1-A.

### OF THE NAVAL MILITIA.

**SECTION 2215-a. Naval militia.** At the discretion of the governor as commander-in-chief, there may be organized a naval force and be designated as "naval militia" and shall consist of one ship's crew and commissioned officers therefor, and prescribe regulations governing the said naval militia. [29 G. A., ch. 90, § 1.]

**SEC. 2215-b. Officers.** The ship's crew shall be commanded by an officer with the rank of commander, one lieutenant commander, who shall be the executive officer, one lieutenant who shall be the navigation and ordnance officer, one ensign who shall be the aide to the commander, one surgeon with the rank of lieutenant, one engineer with the rank of lieutenant, one assistant engineer with rank of lieutenant junior grade. There shall be allowed

to such ship's crew such number of petty officers as the commander-in-chief shall order and direct. Two buglers and not less than forty, nor more than sixty-four petty officers and men. [29 G. A., ch. 90, § 2.]

**SEC. 2215-c. Organization—discipline and exercise.** The organization of the naval force shall conform as nearly as practicable to the provisions of the laws of the United States, and the system of discipline and exercise shall conform as nearly as may be to that of the navy of the United States. The governor shall have the power to alter, annex, consolidate and disband the same whenever in his judgment it is for the good of the service. [29 G. A., ch. 90, § 3.]

**SEC. 2215-d. Uniform.** The uniform of the naval militia shall conform to the regulations in force for the navy of the United States. [29 G. A., ch. 90, § 4.]

**SEC. 2215-e. Election and appointment of officers.** The commissioned officers of the naval militia shall be elected by the officers and men of the ship's crew, under such regulations as the commander-in-chief may prescribe and the ensigns and petty officers shall be appointed by the commander of the naval militia. The time and place of holding elections for officers shall be the same as prescribed for elections in the Iowa National Guard. Provided, the naval militia can be organized and equipped without expense to the state of Iowa, or to the appropriation for the maintenance of the Iowa National Guard, or the appropriation made by the general government to aid the national guard of the several states. [29 G. A., ch. 90, § 5.]

## TITLE XII.

### OF THE POLICE OF THE STATE.

#### CHAPTER 1.

##### OF THE SETTLEMENT AND SUPPORT OF THE POOR.

#### SECTION 2216. Who liable to maintain.

[For earlier annotations, see code, page 779.—Ed.]

The obligation to support children being under these sections primarily upon their father and mother, and secondarily upon their grandfather, in the absence or inability of nearer relatives, held that the grandfather was not bound for their sup-

port, although the evidence showed that their father had abandoned his wife and had no property subject to execution, where there was no showing that he was absent or unable to provide for his children. *Johnson County v. Stratton*, 111-121.

#### SEC. 2234. Application for relief—action of supervisors.

[For earlier annotations, see code, page 784.—Ed.]

If the board of supervisors has in fact employed a competent and efficient physician to care for the poor, the township trustees are not authorized to employ another simply because they believe the county physician is inattentive, neglectful or incompetent. *Lacy v. Kossuth County*, 106-16.

A certificate from the township trustees attached to the account of a physician presented to the board of supervisors is properly admissible in evidence. *Ibid.*

Where a physician is employed by the board of health to attend upon a person

infected with contagious disease he is entitled to compensation from the county if the infected person is a poor person, notwithstanding the employment by the county of another physician to attend generally upon the poor. *Ibid.*

Where it appeared that the board of supervisors had employed a physician but the case in question was not one which would come within his care under his contract of employment, held that the claim of another physician for services rendered in such case was properly allowed. *Taylor v. Woodbury County*, 106-502.

#### SEC. 2235. Payment of claims.

[For earlier annotations, see code, page 785.—Ed.]

The physician may claim for services performed by another physician under his direction. *Taylor v. Woodbury County*, 106-502.

Even though the services for which claim

is made were originally rendered without proper legal sanction, yet the giving of the certificate contemplated in this section cures any such defect in the claim. *Ibid.*

#### CHAPTER 2.

##### OF THE CARE OF THE INSANE.

[By section 8, chapter 118 of the acts of the 27th G. A., (section 2727-a8, herein) the board of control is given full power to manage, control and govern these institutions, with others, and by section 9 of the same act (section 2727-a9, herein) the board of trustees is abolished.—Ed.]

**SECTION 2253-a. Repeal—state hospitals—names.** That section two thousand two hundred fifty-three (2253) of the code be and the same is hereby repealed and the following enacted in lieu thereof: The hospital for the insane at Mount Pleasant shall be known by the name of "Mount Pleasant State Hospital"; the one at Independence, "Independence State Hospital"; the

one at Clarinda, "Clarinda State Hospital"; and the one at Cherokee, "Cherokee State Hospital." [29 G. A., ch. 91, § 1.]

**SEC. 2267. Appeal from finding.** Any person found to be insane in proceedings herein authorized may appeal from such finding to the district court by giving the clerk thereof, within ten days after such finding has been made, notice in writing that an appeal is taken, which may be signed by the party, his agent, guardian or attorney, and, when thus appealed, it shall stand for trial anew. Upon appeal it shall be the duty of the county attorney to prosecute the action on behalf of the informant without additional compensation. [18 G. A., ch. 152, §§ 1, 2.] [29 G. A., ch. 92, § 1.]

[For annotations, see code, page 791.—Ed.]

**SEC. 2279. Insane prisoners—inquiry—confinement.**

The commissioners of insanity have no respect invalid. The court should proceed authority to inquire as to the sanity of a prisoner under arrest on indictment, and the provisions of this section are in this under the provisions of Code § 5540. *Stone v. Conrad*, 105-21.

**SEC. 2291-a. Repeal—amount allowed for care of patients.** That section twenty-two hundred and ninety-one (2291) of the code be and the same is hereby repealed. [27 G. A., ch. 54, §1.] [28 G. A., ch. 140, § 3.] [29 G. A., ch. 157, § 1.]

**SEC. 2291-b. Repeal—amount allowed for care of patients.** That chapter fifty-four of the acts of the twenty-seventh general assembly is hereby repealed and in lieu thereof is enacted the following:

Section 2291. The board of control of state institutions of Iowa may from time to time fix the monthly sum for the board and care of each patient in the hospitals for the insane, which sum for the hospitals at Clarinda, Independence and Mount Pleasant shall not exceed twelve dollars, and for the hospital at Cherokee shall not exceed fifteen dollars. Said sum shall be placed to the credit of the hospital entitled thereto upon certificate of the board of control of state institutions, based upon reports of the superintendent, and paid from the state treasury, as provided by chapter one hundred eighteen (118) of the acts of the twenty-seventh general assembly and acts amendatory thereof, and the certificate of the board shall be competent evidence of the amount due for the time therein stated. The amount credited a hospital for any month shall be based on the average number of patients in the hospital for the preceding month. When the average number of patients in the hospital at Cherokee shall be more than six hundred, the monthly sum shall not exceed fourteen dollars, and when such number shall be more than seven hundred fifty patients the monthly sum shall not exceed thirteen dollars, and when such number shall be more than nine hundred patients the monthly sum shall not exceed twelve dollars. Provided, however, that so much of the monthly sum as exceeds twelve dollars shall be paid by the state from any money in the state treasury not otherwise appropriated and shall not be charged to any county or person. [29 G. A., ch. 157, § 1.]

**SEC. 2291-c. Repeal—support for Cherokee state hospital.** Section 2 of chapter one hundred forty (140) of the acts of the twenty-eighth general assembly is hereby repealed and in lieu thereof is enacted the following:

That in order to maintain the hospital for the insane at Cherokee and provide for the patients therein during the first month of its occupancy, the superintendent is authorized to estimate before the opening of the hospital for the support of five hundred fifty patients for such first month, and the sum of eight thousand two hundred fifty dollars is hereby appropriated for that purpose. [29 G. A., ch. 157, § 2.]

**SEC. 2291-d. Appropriation for transferring patients.** The sum of six thousand dollars, or so much thereof as shall be necessary, is hereby appropriated out of any money in the state treasury not otherwise appro-

priated to pay the expenses of transferring patients in hospitals for the insane to other hospitals, made advisable by the opening of the hospital at Cherokee. The money required for the purpose stated shall be drawn by and on the estimate of the superintendents of the several hospitals, approved by the board of control of state institutions, and may be so drawn before the expenses are incurred or vouchers therefor are filed. Any unexpended balance of money so drawn shall be returned to the state treasury. An itemized statement of the money so drawn and of the expenses so incurred and paid and of the balance, if any, returned to the state treasury shall be made by the board of control and filed in the office of the auditor of state. [29 G. A., ch. 157, § 3.]

**SEC. 2297. Estates of patients liable.**

[For earlier annotations, see code, pages 797-8.—Ed.]

The wife does not become liable to the a patient in the insane hospital. *Black-county* for the support of her husband as *hawk County v. Scott*, 111-190.

**SEC. 2308. County insane fund.** The board of supervisors, when levying taxes for general purposes, shall include therein a tax of one and one-half mill or less, as may be necessary, for the purpose of raising a fund for the support of such insane persons as are cared for and supported by the county in the insane ward of the county poor-house, or elsewhere outside of any state hospital for the insane, which shall be known as the county insane fund, and shall be used for no other purpose than the support of such insane persons. [27 G. A., ch. 55, § 1.]

## CHAPTER 2-A.

### OF THE DETENTION AND TREATMENT OF DIPSOMANIACS, INEBRIATES AND THOSE ADDICTED TO THE EXCESSIVE USE OF NARCOTICS.

**SECTION 2310-a. Board of control to provide department.** That the board of control is hereby directed to provide for the detention and treatment of dipsomaniacs, inebriates and persons addicted to the excessive use of morphine or other narcotics, in one or more of the hospitals for the insane at the discretion of said board. Said department thus provided for to be designated as a hospital for inebriates. [29 G. A., ch. 93, § 1.]

**SEC. 2310-b. Examination—commitment.** That all dipsomaniacs, inebriates and persons addicted to the excessive use of morphine or other narcotics, who shall be citizens of the state of Iowa and residents of the county from which they might be committed to the hospital for inebriates may be brought before the district court or judge of the county where they reside for examination and commitment to said hospital for inebriates. Their examination, trial and commitment shall be governed by the same statutes as now apply to and govern the examination and commitment of incorrigibles to the state industrial school. If it shall be determined by said district court or judge, that such person is addicted to dipsomania, inebriety or to the excessive use of narcotics, he or she shall be committed to such hospital for inebriates, as may be established by the board of control as above provided for. The term of detention and treatment shall be, for the first commitment not less than one, nor more than three years; and for the second commitment not less than two nor more than five years. The governor shall parole a patient on conditions named in the following section. [29 G. A., ch. 93, § 2.]

**SEC. 2310-c. Conditions of parole.** If after thirty days of such treatment and detention a patient shall appear to be cured, and if the physician in charge and the superintendent of said institution shall so recommend, the

governor shall parole said patient, provided that said patient shall pledge himself or herself to refrain from the use of all intoxicating liquors as a beverage, or other narcotics, during the remaining part of his or her term of commitment and shall avoid the frequenting of places and the association of people tending to lead them back to their old habits of inebriety.

And shall send the following report on the first day of every month during term of parole to the governor, which report must be inquired into and approved as correct by the clerk of the district court of the county wherein the patient resides, and said patient shall furnish the clerk of the district court with satisfactory evidence of his sobriety and good habits.

Report of..... to superintendent of hospital for inebriates at ..... Iowa.

I, .... being on parole from the hospital for inebriates at ..... Iowa, do hereby certify that I have up to this date, being the first day of....., 190., refrained from the use of all intoxicating liquors as a beverage, and all narcotics of any kind whatsoever, except it be a moderate use of tobacco.

.....  
.....

I have carefully inquired into the record of ..... as named above and do hereby certify that I believe the statements contained in his above report are true.

.....

Clerk district court of Iowa in and for ..... county, Iowa.

Dated this..... day of....., 190..

And if at any time the patient on parole, for any reason fails to make the above report, the sheriff of the county wherein such patient resides shall without further writ or warrant, return said patient at once to the hospital from which he or she has been paroled on receiving notice of such failure from the clerk of the district court of the county wherein the patient resides, or any three reputable citizens thereof. And the patient so returned shall be detained and treated during the full term of his commitment. [29 G. A., ch. 93, § 3]

SEC. 2310-d. **What statutes apply.** That all statutes of the state providing for the trial, commitment, detention and treatment of incorrigibles sent to industrial schools shall be applicable to trial, detention and treatment of all patients committed under the provisions for this act, except in so far as they may be modified by the provisions of this act. [29 G. A., ch. 93, § 4.]

SEC. 2310-e. **Expenses—how paid.** That the expense of trial, commitment and treatment of such persons so committed under the provisions of this act shall be borne and paid in the same manner and out of the same fund as the expenses of insane patients are borne and paid, and the estates of such patients shall be liable therefor to the same extent as in the case of insane persons. [29 G. A., ch. 93, § 5.]

CHAPTER 3.

OF DOMESTIC ANIMALS.

SECTION. 2312. **Male animals running at large.**

[For earlier annotations, see code, page 801.—Ed.]

The owner of a bull, turning him loose on his own field, with knowledge or notice that the partition fence separating his field from a field of an adjoining owner is insufficient to restrain him, cannot complain that the animal is taken up by the adjoining owner as running at large. *Conway v. Jordan*, 110-462.

Tender of the damages cannot be made until the constable has taken possession of the animal and estimated the damages done. *Ibid.*

**SEC. 2313. Distraint damage feasant—recovery.**

[For earlier annotations, see code, page 802 —Ed.]

Where an animal passes from the premises of the owner to the premises of an adjoining owner, through a defective fence, the latter may restrain him for damage done. *Conway v. Jordan*, 110-462.

**SEC. 2314. What animals not permitted to run at large.**

[For earlier annotations, see code, page 803 —Ed.]

The damages for which animals are distrained must be assessed by the township trustees on notice given as required in Code § 2317. *Holaman v. Marsh*, 90 N. W., 82.

**SEC. 2317. Assessment of damages—sale.**

[For earlier annotations, see code, page 804.—Ed.]

The damages for which animals running at large may be distrained under Code § 2314 must be assessed by the township trustees on notice given to them by the person making distraint. *Holaman v. Marsh*, 90 N. W., 82.

**SEC. 2340. Dogs killed.**

[For earlier annotations, see code, page 808.—Ed.]

Plaintiff having left his horse and buggy in defendant's livery stable went to the buggy at a seasonable hour and in a proper manner to get some article therefrom and was bitten by defendant's dog. Held, that plaintiff not being a trespasser was entitled to recover, whether defendant's employes knew of his presence at the place or not. *Shutz v. Griffith*, 103-150.

Negligence by the injured party, whether of omission or commission, does not exempt the owner of a dog from liability for injuries committed by such dog unless the negligence amounts to an unlawful act. *Ibid.*

Persons who have possession of and harbor dogs are liable therefor as owners under the statutory provision making owners liable for injuries committed by dogs except when the party injured is doing unlawful acts. *Ibid.*

In an action under this section for injury inflicted by a dog, the only defense available to the dog's master is the doing of an unlawful act at the time of the attack by the person injured. *Van Bergen v. Eulberg*, 111-139.

While this section was evidently intended to do away with the necessity of proving scienter, still the plaintiff is not precluded from proving those facts which would have been necessary to a right of action at common law. *Sanders v. O'Callaghan*, 111-574.

At common law a person was not entitled to keep a vicious dog on his premises for the purpose of keeping off trespassers, provided they came there in the day time and on some innocent mission. *Ibid.*

In an action for damages on account of injuries received from a vicious dog, plaintiff must show freedom from contributory negligence. *Ibid.*

**SEC. 2348. Bounties.**

[For earlier annotations, see code, page 809.—Ed.]

While the board may require other evidence than the verified statement of the claimant that the animals had been destroyed, it is not intended to invest the board with the discretion to pay or not if

the essential facts are established to its satisfaction, and on the refusal of the board to pay in a proper case action may be maintained against the county. *Bourrett v. Palo Alto County*, 104-350.

CHAPTER 4.

OF FENCES.

**SECTION 2355. Partition fences.**

[For earlier annotations, see code, page 811.—Ed.]

The rights and duties of adjacent owners of land with respect to partition fences is purely statutory, and as the statute prior to the enactment of the present Code rec-

ognized a hedge fence as a proper form of partition fence and did not specify the height nor required trimming, the owner maintaining such partition fence was not

liable to adjoining owners for damage due to the height and untrimmed condition of such hedge. *Kinney v. Kinney*, 104-703.

#### SEC. 2356. Powers of fence viewers.

[For earlier annotations, see code, pages 811-812.—Ed.]

Fence viewers have no power to decide as to a disputed line, either by measurements of their own or by accepting a dis-

puted survey of another. *Boyd v. Schoop*, 107-10.

#### SEC. 2360. Orders—notice.

The action of the fence viewers is not illegal because their findings are put in writing in another township, provided they

are duly recorded by the clerk in the proper township. *Miles v. Tomlinson*, 110-322.

#### SEC. 2369. Appeal.

The correctness of the findings of the fence viewers is to be determined on

appeal, and not on certiorari. *Miles v. Tomlinson*, 110-322.

### CHAPTER 6.

#### OF INTOXICATING LIQUORS.

#### SECTION 2382. Manufacture, sale or keeping for sale prohibited.

No one, by himself, clerk, servant, employe or agent, shall, for himself or any person else, directly or indirectly, or upon any pretense, or by any device, manufacture, sell, exchange, barter, dispense, give in consideration of the purchase of any property or of any services or in evasion of the statute, or keep for sale, any intoxicating liquor, which term shall be construed to mean alcohol, ale, wine, beer, spirituous, vinous and malt liquor, and all intoxicating liquor whatever, except as provided in this chapter, or solicit, take, or accept any order for the purchase, sale, shipment, or delivery of any such liquor, or aid in the delivery and distribution of any intoxicating liquor so ordered or shipped, or own, keep, or be in any way concerned, engaged or employed in owning or keeping any intoxicating liquor with intent to violate any provision of this chapter, or authorize or permit the same to be done; and any clerk, servant, employe or agent engaged or aiding in any violation of this chapter shall be charged and convicted as principal. Provided, that nothing herein shall prohibit traveling salesmen soliciting orders for the purchase, sale, and shipment of intoxicating liquors, from persons legally authorized to sell or dispense the same. [23 G. A., ch. 35, § 2; 22 G. A., ch. 71, § 1; 20 G. A., ch. 8, § 1; 20 G. A., ch. 143, §§ 10, 11; 17 G. A., ch. 119, § 4; C. '73, §§ 1523, 1540-2, 1554-5; R., §§ 1559, 1562, 1581, 1587; C. '51, §§ 929-31.] [28 G. A., ch. 74, §§ 1, 2.]

[For earlier annotations, see code, pages 819-822.—Ed.]

Proof of the sale of beer is *prima facie* evidence of the sale of an intoxicating liquor and the burden is on the person charged with such sale to show, if he can, that the liquor so sold was not intoxicating. *State v. Spiers*, 103-711.

The fact that the seller is not aware of the intoxicating character of the liquor sold is no defense. *Wilson v. Cory*, 114-208.

Violation by an agent of the conditions of the mulct law will render the principal

liable to the penalties of the prohibitory law. *Hawks v. Fellows*, 108-133.

Where an insured building is described as used for saloon purposes, the fact that the occupant does not conduct his saloon in strict compliance with the law does not vitiate the policy. *Petty v. Mutual Fire Ins. Co.*, 111-359.

The provisions of 28 G. A., chap. 74, amending this section so as to make criminal the soliciting of orders in the state for sales of liquors outside the state to be

shipped into the state, is unconstitutional as an interference with interstate commerce. *State v. Hanaphy*, 90 N. W., 601.

Where a dealer in cigarettes brought into the state packages thereof which were opened by him and contents consisting of small packages containing ten each were exposed for sale and sold, held, that such small packages were not original packages

within the meaning of the law as to interstate commerce, and that the seller was punishable under the anti-cigarette law. (Code §§ 5006, 5007.) The court considers the case of *State v. Coonan*, 82-400, relating to sales of intoxicating liquors in original packages, and overrules it in so far as it is inconsistent with this case. *McGregor v. Cone*, 104-465. But see *State v. McGregor*, 76 Fed., 956.

#### SEC. 2384. Nuisance—penalty—abatement—attorney's fee.

[For earlier annotations, see code, pages 822-6.—Ed.]

While it is not necessary, in order to warrant an injunction, that actual sales must be shown up to the date of the action to enjoin, yet there must be some evidence of the existence of the nuisance at that time. If no nuisance exists when the action is brought, plaintiff is not entitled to a decree. *Sharp v. Arnold*, 108-203.

It is the use of the place in which the inhibited acts are done, rather than the doing of the acts, which constitutes the offense of nuisance here described. Therefore, held that where blank bills of lading for intoxicating liquors were sent to a banker, and persons desirous of purchasing liquors were in the habit of paying the banker for such bills of lading, thereby procuring the liquors from the freight depot, held that such banker was properly convicted for maintaining a nuisance. The use of the building or place for the prohibited purpose renders it a nuisance, although the party charged owns neither the liquors or the place. *State v. Snyder*, 108-205.

In an action for abatement of liquor nuisance and for injunction, evidence of

#### SEC. 2385. Permits.

If the liquor sold by the permit holder is so compounded with other substances as to lose its distinctive character as an intoxicant, and to be no longer desirable for use as a stimulating beverage, and is in fact a medicine, then the permit holder is not guilty of violating the law in making a sale without a written request. *State v. Gregory*, 110-624.

The written requests on which sales are made are admissible in evidence in a prosecution against the seller, and if such requests are defective, the seller is liable. The permit holder should refuse to make a sale on a written request unless he has

illegal sales after the commencement of the action is competent, the charge being of a continuing offense. *Hall v. Coffin*, 108-466.

An injunction may properly be granted against the premises on which the nuisance is maintained and the owner thereof. *Carter v. Bartel*, 110-211.

Where the mulct law is in force, and the seller has complied with its conditions, proof of the mere sale of liquor is not sufficient to sustain a conviction under this section. *State v. Miller*, 114-396.

Where an indictment describes a nuisance as kept in a particular building, situated in a certain town, it is necessary to prove the keeping in the place as charged. *State v. Schuyler*, 109-111.

An indictment for keeping a nuisance, alleging that defendant used a certain building as a drug store "with the intent to sell there intoxicating liquors, to-wit (describing them), and then and there did sell the same," held sufficient, where the words "then and there" were construed as designating the drug store as the place of the unlawful sale. *State v. Pinckney*, 111-34.

reason to believe the statements made therein are true, and in no case should he make such sale unless he knows the person applying therefor is not a minor, intoxicated, or in the habit of using intoxicating liquors as a beverage. When proper requests have been made the question of the seller's good faith in making the sale is for the jury. *Ibid.*

In stating the purpose for which liquor is required in the request provided for by Code § 2394 the purchaser must state a purpose or use authorized by this section. *State v. Swallum*, 111-37.

#### SEC. 2386. Pharmacists—manufacturers of proprietary medicines.

If any such registered pharmacist or manufacturer of proprietary medicines shall sell, barter, give, exchange, dispose of or use intoxicating liquors in any manner or for any purpose other than authorized in the preceding section, he shall be liable to all the penalties and proceedings provided for in this chapter, and upon proof of such violation by a registered pharmacist, the clerk of the district or superior court shall transmit to the commissioners of pharmacy a certified copy of the record thereof within ten days after its

entry, and upon receipt of such certified copy said commissioner may strike his name from the list of registered pharmacists and cancel his certificate. The commissioners of pharmacy are empowered to make such further rules and regulations, not inconsistent with law, with respect to the purchase, keeping and use of intoxicating liquors by registered pharmacists and manufacturers of proprietary medicines, as they shall think proper to prevent abuses of the privilege, and shall revoke the certificate of registration of any pharmacist for repeated violations of this chapter. Said commissioners are authorized to draw from the state treasury an amount not exceeding fifty per cent. of the clear proceeds of all fees collected and paid into the treasury of any county on account of violations of the provisions of this chapter or the chapter regulating the practice of pharmacy, prosecuted by the commissioners, the amounts so drawn to be used solely in prosecutions instituted by them for failure to comply with the provisions of such chapters. The court or clerk thereof, before whom any prosecution is instituted or prosecuted by the commissioners of pharmacy, shall certify to the auditor of state all such cases, and the amount of fees imposed and collected therein. The expenses thus incurred by the commission shall be audited by the executive council, and the amount thereof shall be drawn from time to time upon the warrants of the state auditor. [23 G. A., ch. 35, §§ 13, 17; 22 G. A., ch. 71, § 18.] [27 G. A., ch. 56, § 1.]

#### SEC. 2387. Application for permit.

A decree entered by consent will bar one mit under the provisions of the statute, who has been enjoined from the selling of In re Thoma, 90 N. W., 581. intoxicating liquors from receiving a per-

SEC. 2390. Bond—to be recorded. No permit shall issue until the applicant shall execute to the state a bond in the penal sum of one thousand dollars, with good and sufficient sureties to be approved by the clerk of the court, conditioned that he will well and truly observe and obey the laws of the state now or hereafter in force in relation to the sale of intoxicating liquors, that he will pay all fines, penalties, damages and costs that may be assessed or recovered against him for a violation of such laws during the time for which the permit is granted, and the principal and sureties in said bond shall be liable thereon, jointly and severally, for all civil damages and costs that may be recovered against the principal in any action brought by a wife, child, parent, guardian, employer or other person under the provisions of this chapter. The bond, after being approved and recorded by the clerk, shall be deposited with the county auditor, and suit may be brought thereon at any time by the county attorney, or by any person for whose benefit the same is given. The clear proceeds of all other money which may be collected for breaches of the bond shall go to the school fund of the county. If at any time the sureties on the bond shall file with the court or clerk a written request for release, or become insolvent, or be deemed insufficient by the court granting the permit, or its clerk, such court or clerk shall require a new bond to be executed within a reasonable time to be fixed. If the permit holder fails or neglects to furnish a new bond within the time so fixed, the permit shall from that date become null and void. [23 G. A., ch. 35, § 5; 22 G. A., ch. 71, § 4.] [28 G. A., ch. 75, § 1.]

[For earlier annotations, see code, page 829.—Ed.]

Sales made elsewhere than in the place specified in the permit, while the permit holder continues in business in such place, will undoubtedly constitute a breach of his bond. But where the permit holder has ceased to conduct business in the author- ized locality and is making sales in another building not covered by the permit, although corresponding in general to the description of the permit, the surety will not be liable. *Carter v. Nicol*, 90 N. W., 352.

SEC. 2392. Permit issued. Upon taking said oath and filing said bond, the clerk of the court granting the same shall issue a permit to the applicant,

authorizing him to keep and sell intoxicating liquors as in this chapter provided. The permit so issued shall specify the building, give the street and number or location in which intoxicating liquors may be sold by virtue of the same, and the length of time the same shall be in force, unless sooner revoked. Provided that upon the expiration of the lease or destruction of the building where such business is conducted, or for other good and sufficient cause shown, consent in writing of the bondsmen having been obtained therefor, or a new bond given, the district court of the county which granted said permit, or a judge of said court, may change the place specified in said permit to some other place in the same city, town, or township upon motion therefor. A copy of said motion, and notice of the time when and the place where the same will be heard, shall be given to the county attorney of the county where said place is situated, at least five days before said hearing. [23 G. A., ch. 35, §§ 5, 16; 22 G. A., ch. 71, § 7.] [27 G. A., ch. 57, § 1.]

[For earlier annotations, see code, page 830.—Ed.]

The permit is a trust reposed in the holder, granted after being shown worthy, and may be revoked. An order granting a permit confers no property right and amounts to no more than a mere privilege to sell under certain conditions. *McCoy v. Clark*, 104-491.

Where the permit holder keeps for sale or sells contrary to law he may be enjoined for maintaining a nuisance. *Ibid.*

Where a permit holder takes orders at various places and delivers liquor in pur-

suance of such orders, and receives payment on delivery, the sales are to be deemed made at such places, and not at the place for which the permit is had. *Carter v. Bartel*, 110-211.

Where the permit and bond describe the premises intended to be covered, they do not apply to sales in a different building, although it may be covered by the same description to which the place of business had been removed. *Carter v. Nicol*, 90 N. W., 352.

**SEC. 2393. Record—costs.** The clerk of the court granting the permit shall preserve as a part of the record and files in his office all petitions, and other papers except bonds pertaining to the granting or revocation of permits, and keep suitable books in which bonds and permits shall be recorded. The books shall be furnished by the county like other public records. Whether said permit be granted or refused, the applicant shall pay the costs incurred in the case, and, when granted, he shall make payment before any permit issue, except the court may tax the cost of any witnesses summoned by private persons resisting said application, and the fees for serving such subpoenas, to such persons, when it is shown that such witnesses were summoned maliciously, or without probable cause to believe their evidence material. The fees in such cases shall be as provided in actions at law in the district court. [23 G. A., ch. 35, § 9; 22 G. A., ch. 71, § 10.] [28 G. A., ch. 75, § 2.]

**SEC. 2394. Requests to purchase.**

The seller must believe the statements under the application to be true; he must know the applicant, or have him identified; and he must know or obtain proof that such applicant is not in the habit of using intoxicating liquors as a beverage. The law is violated by sale to persons in the habit of using liquor as a beverage, although the seller is ignorant of such habit. The seller sells at his peril. *Harlan v. Richmond*, 108-161.

The question of good faith in making sales under a permit only arises when proper requests have been made. Prohibition is the rule, and permission to sell is the exception, and he who claims the right to sell must bring himself within the exception. *State v. Gregory*, 110-624.

If the applicant makes the purchase for

another he must give the street and number of the user, and in such case is only required to state his own residence generally, but if he is to use the liquor himself he must describe his residence with the same particularity required when he purchases for another, that is, if his residence is in a numbered city he must give his own street and number. The purchaser must not be allowed to avoid these requirements of the law, even though by oversight, forgetfulness or mistake. *State v. Swallum*, 111-37.

The purchaser must specify in his request the exact purpose and use for which the liquor is required, which must be a use which is lawful under Code § 2385. *Ibid.*

**SEC. 2399. Illegal sales by permit holder—evidence.**

[For earlier annotations, see code, page 832.—Ed.]

Although sales by a permit holder are only made on signed applications for such liquor to be used as medicine, yet if the seller has knowledge that the purchaser is a minor, or is in the habit of using liquor as a beverage, the sale is unlawful. *State v. Skillicorn*, 104-97.

The seller of intoxicating liquors is bound to know at his peril whether a per-

son to whom he sells is within the prohibited class. Where a large number of sales appear to have been regularly made to the same person, and the character and habits of sobriety of persons to whom such sales were made were shown to be such as to bring them within the prohibited class, held, that a presumption of illegal sales would arise. *Hall v. Coffin*, 108-466.

**SEC. 2400. Revocation of permit.** Permits shall be deemed trusts reposed in the recipients, and may be revoked upon sufficient showing by order of a court or judge. Complaint may be presented at any time to the district or superior court, or a judge thereof, which shall be in writing and signed and sworn to by three citizens of the county in which the permit was granted. A copy of the complaint shall, with a notice in writing of the time and place of hearing, be served on the accused five days before the hearing, and if the complaint is sufficient, and the accused appear and deny the same, the court or judge shall proceed without delay, unless continued for cause, to hear and determine the controversy. If continued or appealed at the instance of the permit holder, his permit may, in the discretion of the court, be suspended pending the controversy. The complainant and accused may be heard in person or by counsel, or both, and proofs may be offered by the parties; and if it shall appear upon such hearing that the accused has in any way abused the trust, or that liquors are sold by the accused or his employes in violation of law, or dispensed unlawfully, or he has in any proceeding, civil or criminal, within the last two years, been adjudged guilty of violating any of the provisions of this chapter, the court or judge shall revoke and set aside the permit; the papers and order in such case shall be immediately returned to and filed by the clerk of the court, and, if heard by a judge, the order shall be entered of record as if made in court; and if in this or any other proceeding, civil or criminal, it shall be adjudged by the court or judge that any registered pharmacist, proprietor or clerk has been guilty of violating any provision of this chapter, such adjudication may be by the commissioners of pharmacy regarded as sufficient, if repeated, to work a forfeiture of his certificate of registration. It shall be the duty of the clerk to forward to the commissioners of pharmacy transcripts of such judgments or orders without charge therefor, and as soon as practicable after final judgment or order has been made and entered. [23 G. A., ch. 35, § 7; 22 G. A., ch. 71, § 8.] [27 G. A., ch. 58, § 1.]

[For annotations, see code, page 833.—Ed.]

**SEC. 2401. How business conducted—partner—clerks—physicians.**

A permit holder may employ not more than two registered pharmacists as clerks to sell intoxicating liquors in conformity to the permit and the law; but in such cases the acts of clerks in conducting the business shall be considered the acts of the permit holder, who shall be liable therefor as if he had personally done them, and in making returns, the verification of such requests as may have been received, attested and filled by the clerk must be made by such clerk, and the clerk who transacted any of the business under the permit must join in the general oath required of the employer, so far as relates to his own connection therewith. If for any cause a registered pharmacist who holds a permit shall cease to hold a valid and subsisting certificate of registration or renewal thereof, his permit shall be forfeited and be null and void. Nothing contained in this chapter shall be construed to prevent licensed physicians from in good faith dispensing liquors as medicines to patients actually sick and under their treatment. In case a

permit holder shall die, his personal or legal representative may continue the business, subject to the provisions thereof, through the agency of any reputable registered pharmacist, upon the approval of the court granting such permit, or the clerk thereof, and the giving of a bond as hereinbefore provided. A partner who is a registered pharmacist, not holding a permit, shall have the same rights and be subject to the same restrictions as clerks; and for whose acts the permit holder shall be held responsible the same in all respects as for his clerks. [23 G. A., ch. 35, §§ 2, 15; 22 G. A., ch. 71, § 16.] [28 G. A., ch. 76, § 1.]

**SEC. 2403. Selling or giving to minor or intoxicated person or person in the habit of becoming intoxicated.** No person by himself, agent or otherwise, shall in any manner procure for or shall sell or give any intoxicating liquors to any minor for any purpose, except upon written order of his parent, guardian or family physician, or give to or in any manner procure for or sell the same to any intoxicated person or one in the habit of becoming intoxicated. Any person violating the provisions of this section shall forfeit and pay the sum of one hundred dollars for each offense, to be collected by action against him, or, if a permit holder, against him and the sureties on his bond. Such action may be brought by any citizen of the county. One half of the amount so collected shall go to the informer and one half to the school fund of the county. [20 G. A., ch. 143, § 9; C. '73, § 1539.] [28 G. A., ch. 77, § 1.]

[For earlier annotations, see code, page 834.—Ed.]

The penalty herein provided for is not covered by the bond required under Code § 2448, Par. 3, of one who carries on the business of selling under the mulct law, nor that provided for in Code § 2422 as to bonds required of permit holders. *Headington v. Smith*, 113-107.

The statute absolutely prohibits the sale of liquor to a minor for any purpose whatever, and the seller is bound at his peril to know whether the person to whom he sells is within the prohibited class. *Fielding v. La Grange*, 104-530.

Where liquor is sold to an intoxicated person, and his death is caused by drinking the same, the administrator of the estate cannot recover damages for his

death against the person selling the liquor in violation of this section. *Bissell v. Starzinger*, 112-266.

The action to recover the penalty provided for sales to minors or habitual drunkards, may be brought in the county of defendant's residence, irrespective of the place of sale. *Carrier v. Bernstein*, 104-572.

Such an action cannot be joined with an action by a wife to recover damages for sales of liquor to her husband. *Ibid.*

The provisions of the mulct law do not relieve one who sells under its provisions from liability for sales to minors or habitual drunkards. *Ibid.*

**SEC. 2405. Action to abate nuisance—injunction—contempt.**

[For earlier annotations, see code, pages 835-7.—Ed.]

A temporary injunction may be granted against a person holding a permit to sell intoxicating liquors for keeping for sale or selling the same in his pharmacy contrary to law. *McCoy v. Clark*, 104-491.

The granting of a temporary writ as a matter of course follows the continuance of an application for the temporary writ, but not a general continuance of the action. *Powers v. Winters*, 106-751.

**Permanent injunction.** A decree of injunction should not be entered for the closing of a building and making the costs and attorneys' fees in the action a lien thereon where it appears that the illegal sales in the building have been without the knowledge or consent of the owner and for a very short time. *Merryfield v. Swift*, 103-167.

An injunction cannot be granted against a person to restrain him from selling

liquor independent of the place where it is sold. *State v. Frahm*, 109-101.

Where a permanent injunction has already been granted against the members of a firm, another decree for an injunction against them as individuals should not be granted. *Carter v. Bartel*, 110-211.

An injunction may properly be granted against the premises on which the nuisance is maintained and the owner thereof. *Ibid.*

Where it appears that defendant has in good faith abandoned the business before the trial and sold his interest in the premises on which the crime is charged to have been carried on, no injunction should be granted. *Patterson v. Nicol*, 88 N. W., 323.

Primarily a suit under this section has for its object the termination of the unlawful use of the particular premises, and the resulting consequence of restraining one found guilty from establishing a nuisance.

sance elsewhere is only incidental. Therefore, if the action is abated under the provisions of Code § 2410 by the giving of bond, no judgment can be rendered which will have effect as to a nuisance subsequently established on other premises. *Morris v. Lowry*, 113-544; *Morris v. Connolly*, 113-545.

One who is enjoined from the unlawful sale of intoxicating liquor, may, without violating such injunction, make sales in compliance with the provisions of the mulct law. *Landt v. Remley*, 113-555.

A prior injunction will not bar a second action to enjoin for the same nuisance where it appears that the prior injunction

was secured through the fraud of the defendant. *Cameron v. Tucker*, 104-211.

A prior injunction against the owner of premises will not bar a second action for an injunction against such owner and sureties on his bond given under the provisions as to the mulct tax. *Ibid.*

The object of the law authorizing injunctions is directed to the premises as well as to the individual and if an individual who has been enjoined engages in the business in another building or place the latter may be abated though the defendant be guilty of contempt in prosecuting the business therein. *Hill v. Dunn*, 90 N. W., 705.

#### SEC. 2406. How brought and tried—evidence—attorney's fee.

[For earlier annotations, see code, pages 837-8 —Ed.]

This section fixes the amount of the attorney's fee which is to be allowed in

such cases under the general provisions of Code § 2429. *Carter v. Bartel*, 110-211.

#### SEC. 2407. Violation of injunction.

[For earlier annotations, see code, page 839.—Ed.]

It is no defense that accused has acted in good faith upon the advice of counsel in regard to selling liquor in violation of the injunction. *State v. Stevenson*, 104-50.

A decree enjoining a party to the suit from selling liquor is self-executing, and its violation is a contempt, though no formal writ of injunction has issued and been served on such defendant. *Bartel v. Hobson*, 107-644.

Where the defendant who is enjoined is represented in the case by attorney when the decree is rendered, he is chargeable with notice of the decree. *Hawks v. Fellows*, 108-133.

Violation by an agent of an injunction

will subject the principal to punishment for contempt. *Ibid.*

This section requires the setting out of the alleged facts constituting the violation of the injunction, but an information reciting the issuance of an injunction, the knowledge thereof, and the selling and keeping for sale of liquor in violation of its terms, is sufficient. It was not intended to require the setting out of the evidence upon which the proceeding must finally be determined. *McGlasson v. Scott*, 112-289.

A judgment in an injunction proceeding should be proved either by the record itself or by an authenticated copy thereof. *Ibid.*

#### SEC. 2408. Abatement.

[For earlier annotations, see code, page 840.—Ed.]

The existence of a nuisance being established, a decree, as provided in this section, must be given, unless action has been abated by the owner giving bond, and paying costs before order of abatement, as

provided in Code § 2410. Such abatement should have the effect of closing the building referred to against all uses, unless sooner released by proceedings under that section. *McCoy v. Clark*, 109-464.

**SEC. 2410. Abatement by owner.** If the owner appears and pays all costs of the proceeding, and files a bond with sureties to be approved by the clerk in the full value of the property, to be ascertained by the court, or, in vacation, by the clerk, auditor and treasurer of the county, conditioned that he will immediately abate said nuisance and prevent the same from being established or kept therein within a period of one year thereafter, the court, or, in vacation, the judge, may, if satisfied of his good faith, order the premises closed under the order of abatement to be delivered to said owner, and said order of abatement canceled so far as the same may relate to said property; and if the proceeding be an action in equity, and said bond be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated as to said building only. The release of the property under the provisions of this section shall not release it from any judgment, lien, penalty or liability to which it may be subject by law. [21 G. A., ch. 66, § 7.] [29 G. A., ch. 94, § 1.]

[For earlier annotations, see code, page 840.—Ed.]

The giving of a bond abates the action, and not simply the nuisance, and therefore in such a case no judgment can be ren-

dered. *Morris v. Lowry*, 113-544; *Morris v. Connolly*, 113-545.

### SEC. 2413. Search warrant—seizure.

[For earlier annotations, see code, pages 841-2.—Ed.]

While the information should state the name of the owner or keeper of the intoxicating liquor so that in case of seizure notice thereof may be given to him, yet the determination as to who owned or kept it is important only when the owner or keeper resists unsuccessfully a judgment of forfeiture, and it becomes neces-

sary to tax costs. Where the claimant of the liquor states that he was the keeper thereof, there is no occasion for the jury to determine that fact, and he is liable for costs as fixed by the finding that the liquor was kept for illegal purposes. *State v. Intoxicating Liquors*, 109-145.

### SEC. 2415. Notice—trial—judgment—appeal.

[For earlier annotations, see code, page 843.—Ed.]

In a proceeding to forfeit liquor charged to be kept for illegal purposes, the presumption arising under Code § 2427 that the keeping by a person not authorized to sell and on premises not used exclusively for a private dwelling, throws the burden

upon a claimant of the liquor to show not only that he did not keep the liquor for illegal sale, but also that it was not kept by any one for that purpose. *State v. Intoxicating Liquors*, 109-145.

### SEC. 2418. Civil action for damages by wife, parent, child, etc.

[For earlier annotations, see code, pages 844-7.—Ed.]

In an action by a child for damages on account of sale of liquor to a parent, evidence of the number of children, even though immaterial, will not be prejudicial. *Shull v. Arie*, 113-170.

Under this section both principal and agent are liable, but the principal is liable for an authorized sale made by the agent. *Ibid.*

The measure of damages in an action for loss to a wife by reason of causing the intoxication of her husband is dependent on what the husband had in fact done for the support of the wife prior to the wrongful acts of defendant in selling him intoxicating liquors. *Bellison v. Apland*, 89 N. W., 22.

It is error to instruct the jury that the defendant in such a case is liable for all damages sustained by plaintiff on account of the intoxication of her husband where it appears that the husband procured intoxicating liquors elsewhere, which he drank, and which contributed to his besotted condition during the time complained of. *Ibid.*

Evidence of former suits of the same character by the wife against other defend-

ants is admissible on the question of plaintiff's good faith in bringing the action. *Ibid.*

In an action to recover damages for permanent injuries received by the husband by reason of the intoxication complained of, he may be permitted as a witness to exhibit to the jury his physical condition. *Faivre v. Manderscheid*, 90 N. W., 76.

A joint action may be maintained against different persons who contributed to the intoxicated condition causing injury to the husband, although the defendants were conducting separate places of business and did not act in concert. *Ibid.*

An action by a wife for damages for the sale of intoxicating liquor to her husband cannot be joined with an action to recover a penalty for sale to minors or intoxicated persons. *Carrier v. Bernstein*, 104-572.

The bondsmen of one who purports to sell in compliance with the conditions of the mulct law, but has not filed the requisite consent of adjoining property owners, are liable for damages provided for under this section. *Breeding v. Jordan*, 88 N. W., 1090.

### SEC. 2419. Transportation to one not holding permit.

[For earlier annotations, see code, page 847.—Ed.]

The crime described in this section may be charged in the language of the statute. *State v. Reilly*, 108-735.

An individual engaged in illegal traffic in intoxicating liquors, if not a carrier, falls within the designation of "other persons" under the language of this section. *Ibid.*

Notwithstanding the so-called Wilson law, the statutory provisions as to transportation of liquors into the state have no application to carriers transporting such liquors into the state from another state. *Rhodes v. Iowa*, 170 U. S., 412.

**SEC. 2422. Lien of judgment—liability of sureties—costs—evidence.**

[For earlier annotations, see code, pages 848-850.—Ed.]

Where the real owner of property has an opportunity to make defense in the action he is bound by the judgment declaring a lien on such property. *State v. Mateer*, 105-66.

Where defendant has been convicted of maintaining a liquor nuisance, the governor may remit the fine but cannot remit the costs nor suspend their execution. *Ibid.*

The bond here provided for does not cover the penalty authorized by Code § 2403 in case of sales to minors. *Headington v. Smith*, 113-107.

Authority to sell under the provisions of the mulct law is not the same as that given to a permit holder. *Ibid.*

**SEC. 2423. Payments—contracts—negotiable paper.**

[For earlier annotations, see code, pages 851-3.—Ed.]

The person named in this section as "receiver," and who is made liable for a return of the money, is evidently the person to whom it belonged when paid by the purchaser. It is not participation in making the sale, nor the handling of the money that renders one liable for its return, but only the receipt of such money by him as his own. *Foley v. Leisy Brg. Co.*, 89 N. W., 230.

An action under this section to recover back payments made for intoxicating liquors is an action for the enforcement of a statutory penalty, and cannot therefore be removed to the federal courts. *Hamilton v. Joseph Schlitz Brg. Co.*, 100 Fed., 675.

When the buyer accepts liquors shipped to him on his order, given to the seller in another state, his liability is on the contract of sale thus made in the state where the seller resides, even though in the meantime he has countermanded the order. His acceptance is to be deemed a waiver of the countermand, rather than as giving rise to an action on implied contract. *Gross v. Feehan*, 110-163.

A contract between a principal in another state and an agent in this state to sell intoxicating liquor in original packages prior to the passage of the act of congress subjecting the traffic in intoxicating liquors brought into the state to the regulations of the state, was not unlawful. *Green v. Schoenhofen Brg. Co.*, 103-252.

A contract for the sale of property, a part

consideration of which is an indebtedness for intoxicating liquors, is wholly void, and the person who has contracted to convey may have his title quieted as against the person with whom the illegal contract of conveyance was made. *Lindt v. Uihlein*, 109-591.

One who claims title to real property in consideration of the illegal sale of intoxicating liquors cannot, after his title is adjudged to be void on that ground, assert the rights of an occupying claimant. *Lindt v. Uihlein*, 89 N. W., 214.

Where a salesman has only authority to take orders subject to approval, and no part of the price is paid, nor any part of the goods delivered when the orders are taken, which are to be filled in another state, the contract is not in violation of the laws of this state. *Sachs v. Garner*, 111-424.

Money paid for liquor sold and shipped at a point outside of the state on orders there received and approved cannot be recovered back under this section. *Brown v. Wieland*, 89 N. W., 17.

As to payments for liquors unlawfully sold in this state, the obligation to repay exists from the time the payment is made, and only demand is necessary to maintain an action on the claim, and therefore such a claim may be introduced by way of counter claim, under the provisions of Code § 3570, although at the time the original action is brought no demand has yet been made. *Ibid.*

**SEC. 2425. Several counts—second conviction.**

[For earlier annotations, see code, page 854. Ed.]

A prosecution under this section is within the jurisdiction of a justice of the peace, although the aggregate of the fines imposed may be in excess of \$100, but this is be-

cause more than one offense may be charged in the information, the penalty for each offense being within the constitutional limitation. *State v. Babcock*, 112-250.

**SEC. 2427. Evidence of illegal selling or keeping—license.**

[For earlier annotations, see code, page 855.—Ed.]

The presumption which arises from the finding of liquor on the premises of defendant is that the liquor is kept by some one for illegal sale, and in a prosecution for forfeiture of such liquor the burden is on defendant claiming to be the owner of the

liquor to show not only that he did not keep the liquor for illegal sale, but that it was not kept by any one for that purpose. *State v. Intoxicating Liquors*, 109-145.

**SEC. 2429. Attorney's fees.**

[For earlier annotations, see code, page 856.—Ed.]

The provisions of this section as to the amount of the attorney's fee are limited by those of Code § 2406, and the cases provided for in that section. *Carter v. Bartel*, 110-211.

## MULCT TAX.

**SEC. 2432. Payment of—lien.**

[For earlier annotations, see code, page 857.—Ed.]

The mulct tax is not payable by a registered pharmacist who has a permit for the sale of intoxicating liquors, although he sells in violation of his permit. *In re Assignment of Shonkwiler*, 104-67.

Where at the time the mulct tax law went into effect certain premises were already leased under terms by which the lessor could terminate the lease in the case of illegal sale of liquor on the premises, and the lessor had knowledge of illegal sales and did not take steps to terminate the lease, held, that the premises were subject to the tax. *In re Smith*, 104-199.

No notice to the lot owner of the assessment and levy of the mulct tax is necessary. It is a tax to be assessed and levied by virtue of a general law upon certain persons and property coming within the provisions of the act. The statute contemplates that the person liable to the tax shall appear and pay the same without notice. *Ibid.*

The mulct tax is to be assessed against every person, other than registered pharmacists holding permits, who is engaged in selling or in keeping with intent to sell intoxicating liquors, and upon the real property, and the owner thereof, in or upon which such liquors are sold or kept with intent to sell. The tax is to be assessed regardless of the fact that no petition of consent has been secured or permission to sell granted. The petition and permission are important only in determining whether prosecution under the prohibitory law is barred; they have no relation to the taxing provision. *Ibid.*

The mulct tax may properly be levied against the owner of the premises who, by the use of ordinary care and diligence, might have known of the unlawful sales of liquor thereon. *David v. Hardin County*, 104-204.

Under provisions of prior statutes requiring a levy of the mulct tax annually by the board of supervisors, held that where sales were continued for more than six months

of the year there could not be any abatement of the full amount of the annual tax. *Hubbell v. Polk County*, 106-618.

The provisions of the prior statute as to time of making the levy held directory only and that a levy in December instead of in September was valid. *Ibid.*

It is the property used in connection with the business, and this alone, which is liable for the tax. If a man has divided his property in good faith, so that a part is not used in connection with the business, such part is not liable for the tax, whether it be a part of the same plat lot, or a distinct or separate portion of the same block of buildings. It does not follow that because, for the purpose of a general assessment, property has been treated as one tract, the entire tract is subject to mulct tax. *Lucas County v. Leonard*, 107-593.

On the other hand, the mulct tax is not limited in its application to the ground only upon which the building used for the purpose stands. The law intends to subject to the tax not only the building and the ground upon which it stands, but also all land appurtenant and used in connection therewith. *Ibid.*

Where property was sold at tax sale for the mulct tax at the instance of the bondsman who was liable for the payment of the tax, and the sale was subsequently set aside as invalid, held that such bondsman could not recover from the county the amount paid by him at the sale under the provisions of Code § 1446. *Guedert v. Emmet County*, 89 N. W., 85.

This so-called tax is merely a charge or license exacted for the privilege of carrying on the business of selling intoxicating liquors, and is therefore not a tax within the meaning of the federal bankrupt law requiring trustees in bankruptcy to pay all taxes legally due and owing by the bankrupt in advance of the payment of dividends to creditors. *In re Ott*, 95 Fed., 274.

**SEC. 2433. Return by assessor.** In the months of December, March, June, and September of each year, and before the twentieth day of each of said months, the assessor of each township, town or city, or assessment district thereof, shall return to the county auditor a list of persons who are, or since the last quarterly return have been, engaged in carrying on within said township, town, city or assessment district the business of selling or keeping for sale intoxicating liquors, or maintaining any place where such

liquors are sold or kept for sale, and also a description of the real property wherein or whereon such business is carried on or such place is maintained, with the name of the occupant or tenant and owner or agent. At least five (5) days before the assessor makes the return above contemplated to the county auditor he shall give to the person found in possession of each place which he intends to list, or is required to list, and to the tenant occupant and owner of such place a notice in writing that he intends to return such list to the county auditor charging the property itself and the owner of the property therein described and the person who owns or conducts the business with the mulct tax. But if any one of the persons to whom the assessor is herein required to give notice does not reside within the assessor's assessment district it shall be sufficient for the assessor to mail, at least five days before he makes such return to the auditor, a copy of such notice to such person at his last known post-office address; and if there is any one whose post-office address cannot be ascertained by the assessor it shall be sufficient as to such person for the assessor to post a copy of such notice in some conspicuous place on the front of the property about to be listed as liable to the tax. Service of notice on any agent having general charge of the property or on any agent renting or collecting rent on the property so used or having authority to rent or collect rent on such property, or on any member of the owner's family over fourteen (14) years of age shall be equivalent to notice to the owner of such property. The assessor shall give notice in each case in such one of the ways above provided as the circumstances of the case require, and he shall show in his return to the auditor that he has given notice and the manner of the service. The return signed by the assessor shall in all cases be admissible in evidence without further proof, and such return shall have the same force and effect as the oath of the assessor. The burden of proof shall in all cases be upon the party claiming that notice was not given. The county auditor shall furnish to the several assessors of his county, printed blanks upon which to give the notice contemplated in this amendment. Any assessor wilfully failing to comply with the provisions of this section shall pay a fine of fifty dollars and costs for each offense. [25 G. A., ch. 62, § 2.] [29 G. A., ch. 95, § 1.]

**SEC. 2435. Statement by citizens.** Should the assessor for any reason fail to perform his duty, any three citizens of the county can, by verified statement on information and belief, addressed to the county auditor, procure the listing of names and places as above provided, with the same force and effect as if done by the assessor. At least five (5) days before listing the property or names with the county auditor as contemplated in code section twenty-four hundred thirty-five (2435) such citizens shall give notice in writing of their intention so to do to the same parties and in the same manner as required of the assessor in section one (1) of this amendment, and proof of the service of notice shall be made by the affidavit of one or more of the citizens making the return, which affidavit shall be returned to and filed with the auditor with the list of names and property sought to be charged; and the return and affidavit of the citizens so filed with the county auditor shall be admissible in evidence in the same way and with the same force and effect as the return of the assessor. [Same, § 3.] [29 G. A., ch. 95, § 2.]

**SEC. 2436. Quarterly installments—lien—penalty.**

Under previous statutory provisions levy of the tax by the board of supervisors was essential. *Smithberg v. Archer*, 108-215.

Where one sells liquor after the beginning of a period for which taxes are to be paid he becomes liable for the entire amount of the tax, and evidence of subse-

quent abandonment of the business before the expiration of the period is immaterial. *State v. Miller*, 114-396.

A surety on the bond who pays the tax is not subrogated to the county's rights under this section. *Knoll v. Marshall County*, 114-647.

**SEC. 2439. When delinquent—sales for.**

A suit in equity cannot be maintained against the owner of the land on which the nuisance is situated to enforce the pay-

ment of the tax. *Crawford County v. Laub*, 110-355.

**SEC. 2441. Application for remission.**

The board of supervisors in considering an application for remission of the mulct tax has no power to determine the question of priority as against a mortgage of the premises, nor can the district court on appeal from the action of the board of supervisors consider such question. *David v. Hardin County*, 104-204.

The word "year" as used in 25 G. A., chap. 62, with reference to the mulct tax, has reference to a calendar year; and therefore where the tax was not payable in advance because the case was not one where consent to the sale could be given, and the property was not shown to be subject to assessment until near the end of the

calendar year, held that the board of supervisors at its January meeting could only levy such tax on the premises for the remainder of the preceding calendar year. *Ibid.*

But where the place had been used for more than six months of the calendar year for sale of liquor and the board at its September meeting levied a tax of six hundred dollars against the property, held, that under the statute the owner was not entitled to a remission of any portion of the tax on the ground that the premises had thus been used for less than one year. *Engelthaler v. Linn County*, 104-293.

**SEC. 2447. Effect of payment.**

[For earlier annotations, see code, page 860.—Ed.]

The business of selling intoxicating liquor in compliance with the provisions of the mulct law is lawful, and a note given by one partner in such business to another for the purchase of the interest of the latter in such business is valid. *Phillips v. Gifford*, 104-458.

A condition in such note that it shall be void "if the payor is obliged to abandon his present business on account of a change of the liquor law by the next legislature," held to be a valid condition. *Ibid.*

A person operating under the mulct law is engaged in a lawful occupation. *State v. Miller*, 114-396; *Iowa City v. McInnerness*, 114-586.

The provisions of the mulct law do not relieve the parties selling in accordance therewith from liability to a wife for damages by reason of sales to her husband nor from the penalty provided for sales

to minors or habitual drunkards. *Carrier v. Bernstein*, 104-572.

Violation of the provisions of the mulct law by an agent subjects the seller to the penalties of the prohibitory law as to the sale of liquor. *Hawks v. Fellows*, 108-133.

Notwithstanding a mistake of law on the part of one carrying on a business under the supposed protection of the mulct law, he renders himself liable to the penalties of the prohibitory law if he violate the conditions under which he is authorized to conduct the business. *State v. Gifford*, 112-648.

One who sells in compliance with the mulct law does not violate a previous injunction restraining him from making further unlawful sales, but if he attempts to act under the mulct law without complying with its provisions he violates such injunction. *Landt v. Remley*, 113-555.

**SEC. 2448. When a bar—conditions.** In any city, including cities acting under special charters, of five thousand or more inhabitants, no proceedings shall be maintained against any person who has paid the last preceding quarterly assessment of mulct tax, nor against any premises as a nuisance on account of the selling or keeping for sale therein or thereon, by such person, of such liquors, provided the following conditions are complied with; and in any city of over twenty-five hundred and less than five thousand inhabitants, when a written statement of consent that intoxicating liquors may be sold in such city, signed by eighty per cent. of the voters residing in such city, voting therein at the last preceding election, as shown by the poll list of said election, shall have been filed with the county auditor, and shall by the board of supervisors at a regular meeting, or at a special meeting called for that purpose, have been held sufficient, and its findings entered of record, which statement when thus found sufficient, shall be effectual for the purpose herein contemplated until revoked, said city shall come within the provisions of this section:

1. *Statement of consent—action of supervisors.* A written statement of general consent that intoxicating liquors may be sold in such city, signed by a majority of the voters residing in such city, voting therein at the last preceding election, as shown by the poll list of said election, shall have been filed with the county auditor and shall, by the board of supervisors, at a regular meeting, have been held sufficient, and its finding entered of record, which statement when thus found sufficient, shall be effectual for the purpose herein contemplated, until revoked, as hereinafter provided.

2. *Resolution of council—consent of property owners—officers barred—limits.* The person appearing to pay the tax shall file with the county auditor a certified copy of a resolution regularly adopted by the city council, consenting to such sales by him, and a written statement of consent from all the resident freeholders owning property within fifty feet of the building where said business is carried on. But in no case shall said business be conducted by any person holding any township, town, city or county office, or within three hundred feet of any church building or schoolhouse, nor within one-half mile of the place where any agricultural fair is being held.

3. *Bond.* He shall file with the county auditor, to be approved by the clerk of the district court, a bond to the county, in the sum of three thousand dollars, conditioned upon the faithful observance of all the provisions of this chapter relating to the mulct tax, and for the payment of all damages that may result from the sale of intoxicating liquors upon the premises occupied by the obligor. Said bond shall be signed by himself as principal, and by two sureties who shall qualify each in double the amount of the bond, and neither of whom shall be surety on any other like bond, provided that any surety company, authorized to do business in this state, under the laws thereof may become sole surety on any and all bonds required under this section.

4. *Place of sale.* Said selling or keeping for sale of intoxicating liquors shall be carried on in a single room having but one entrance or exit, and that opening upon a public business street. The bar where liquors are furnished shall be in plain view of the street, unobstructed by screens, blinds, painted windows or any other device. There shall be no chairs, benches, nor any other furniture in front of the bar, and only such behind the bar as is necessary for the attendants. A list of names of all persons employed about the place shall be filed with the county auditor, and no persons shall be permitted behind the bar except those whose names are so listed.

5. *Conduct.* The place shall be conducted in a quiet, orderly manner.

6. *Gaming and amusements.* There shall be no gambling or gaming with cards, dice, billiards or any other device, nor any music, dancing or other form of amusement or entertainment, either in the room where said business is carried on or in any adjoining room or building controlled by the person, partnership or corporation carrying on said business.

7. *Obscene pictures.* There shall be no obscene or impure decorations, inscriptions, placards or any such thing in the place.

8. *Females.* No female shall be employed in the place.

9. *Opening and closing.* The place shall not be open nor any sales be made earlier than five a. m. nor later than ten p. m. on any day. It shall not be open at all, nor shall any sales be made, on the first day of the week, commonly called Sunday, nor on any election day or legal holiday, nor on the evening of such days.

10. *Minors, drunkards, intoxicated persons.* No minor, drunkard or intoxicated person shall be allowed in the room, and no sales of intoxicating liquors shall be made to any minor, drunkard or intoxicated person, or knowingly to any person who has taken any of the so-called "cures for drunkenness."

11. *Written notice not to sell.* No sale of intoxicating liquors shall be made to any person whose wife, husband, parent, child, brother, sister, guar-

dian, ward over fourteen years of age, or employer, shall by written notice forbid such sales.

12. *Payment of tax.* If the name of a person desiring to carry on the business of selling or keeping for sale intoxicating liquors, or maintaining a place where such liquors are sold or kept for sale, has not been entered by the auditor on the list of such persons as hereinbefore provided for, or if the property wherein or whereon such business is to be conducted has not likewise been entered by the auditor on such list, then the name of such person and the description of such property shall be entered upon such list by the treasurer, and a quarterly installment of tax shall be paid as though the name of such person and the description of such property had been duly entered upon such list at the last preceding quarterly assessment for such purpose. [Same, § 17; 18 G. A., ch. 82; 18 G. A., ch. 147; 17 G. A., ch. 119, § 2; C. '73, § 1114.] [29 G. A., ch. 96, § 1.]

[For earlier annotations, see code, page 862.—Ed.]

**Par. 1 Statement of consent.** Under 25 G. A., ch. 62, the authority to determine whether the petition of consent was sufficient was not vested in the city council, and its action in granting permission to sell was not conclusive. *State v. Pressman*, 103-449.

In determining the sufficiency of the signatures to the petition the poll books and registration lists are the best evidence of who cast ballots at the election. *Ibid.*

One who acts under the mulct law, in relying on the sufficiency of a petition of consent, does so at his peril, and if the statement of consent is insufficient he may be punished for illegal selling. *Bartel v. Hobson*, 107-644.

The Official Register of the state is, by Code § 177, made conclusive evidence as to the number of inhabitants in the city. *In re Sale of Intoxicating Liquors*, 108-368.

The poll list is made the only and exclusive evidence as to who voted in the particular localities. *Porter v. Butterfield*, 89 N. W., 199.

A statement of consent filed before the present Code went into effect is not effectual under its provisions to suspend the penalties of the prohibitory law. The privilege to sell acquired under such a statement of consent does not constitute a right which is protected as against the repeal of prior statutes resulting from the adoption of the Code. *West v. Bishop*, 110-410.

**Par. 2. Resolution of council.** Where the application is for permission to a firm to sell intoxicating liquors under the mulct law, the authority given by the council to such firm is not available to one member of the firm to whom the business is transferred. *State v. Zermuehlen*, 110-1.

**Consent of property owners.** The filing of a statement of consent by adjoining property owners is a condition precedent to the right to sell under the mulct law, and sales made before such statement of consent is filed are unlawful. *Landt v. Remley*, 113-555.

Where the bondsman bought in at tax

sale the property of his principal, the sale being at his instigation and for taxes for which he was liable, held that he could not recover the amount paid from the county upon the setting aside of the sale as invalid. *Guedert v. Emmet County*, 89 N. W., 85.

The surety on the bond who pays the amount of the tax is not subrogated to any lien of the county against the property for the payment of such tax. *Knoll v. Marshall County*, 114-647.

**Par. 3. Bond.** The bond here provided for does not cover the payment of assessments required by city ordinance, under Code § 2455. *Ottumwa v. Hodge*, 112-430.

Nor does the bond cover the penalty specified by Code § 2403 for sales to minors. *Headington v. Smith*, 113-107.

The sureties on the bond are liable for sales which are unlawful under Code § 2418, although the seller, purporting to act under the provisions of the mulct law, has failed to file the requisite consent of adjoining property owners. *Breeding v. Jordan*, 88 N. W., 1090.

**Par. 4. Place of sale.** The keeping of a place for the sale of intoxicating liquors, as authorized by the mulct law, does not warrant the peddling of such liquors in other parts of the city, either at wholesale or at retail. *Cameron v. Fellows*, 109-534.

Compliance with the mulct law will not authorize the maintenance of a cold storage warehouse wherein intoxicating liquors are kept for sale, and the filling of orders from such warehouse by delivery to purchasers at different places about the city. *Carter v. Miller Brewing Co.*, 111-457.

The statutory provision as to one entrance is violated where, in addition to the front door, the room has a door leading into another room or shed, where liquor is stored. *State v. Bussamus*, 108-11.

Where there was a door connecting the place where liquors were sold with a cellar which was used as a store-room for such liquor, which cellar had an outside entrance, the room in which the sales

were made having also an outside entrance, held that the use of the room and the cellar together constituted a violation of the provisions of this section. *Powers v. Klatt*, 111-357.

There is no exception in the statute to the requirement that the room in which the liquors are sold shall have but one entrance or exit, and an additional doorway may not be maintained, even for the convenience of the proprietor or his employes. *State v. Gifford*, 112-648.

It is a violation of the law to have a smaller room partitioned from the main room to be used for a store-room, or to so use a cellar connected with the main

room having also an entrance from the street. *Garret v. Bishop*, 113-23.

Under the evidence in a particular case held that a place from which the sale of intoxicating liquors was made was not a single room, having but one entrance or exit, and that opening upon a business street. *Bartel v. Hobson*, 107-644.

**Par. 9. Opening and closing:** The act of keeping a saloon open on election day is punishable by reason of this provision, and the city council cannot provide for the punishment of the same act, either under Code § 2455, or under the general powers given by Code § 680. *Iowa City v. McInerny*, 114-586.

### SEC. 2449. Cities under five thousand and towns.

Where the petition of consent was presented after the taking effect of the Code, held that it was immaterial that some of the signatures to the petition had been affixed thereto before the Code took effect. *Cameron v. Fellows*, 109-534.

In determining whether the percentage of signers is sufficient the statement of consent is to be compared with the poll books of the general election preceding the time when the petition is filed. *Ibid.*

But one general petition of consent for the county may be canvassed by the board of supervisors, and in acting on that petition the board may determine with reference to particular towns whether the number of signers to the general petition who reside in that town, and in the township in which it is located, constitutes the required proportion of voters in such town and township. But the board has no

authority to canvass a subsequent petition with reference to a particular town not found on the canvass of the general petition to be one in which sales of liquor may be made. *Meyer v. Hobson*, 90 N. W., 85.

To authorize the sale of liquors in a town there should be a finding by the board of supervisors in connection with their canvass of the statement of consent, that there are the requisite number of signers in such town, and in making such determination the board may hear evidence. Therefore in an action in which the right to sell liquors in such town is involved the finding of the board of supervisors on the sufficiency of the number of signers in the town is the only evidence which may be considered. If there is no finding as to the town by the board, then there is no right to sell. *Hill v. Gleisner*, 112-397.

### SEC. 2450. Sufficiency of statement—finding—appeal.

Where the record of the findings of the board as to the number of signers shows the number of voters and the number of signers in each of the election precincts, it is sufficient, although the aggregate for each township is not footed up. *Cameron v. Fellows*, 109-534.

The statute requires the county attorney to appear against the statement in all proceedings before the district court upon appeal. *Green v. Smith*, 111-183.

The proceeding here contemplated is a special proceeding, and there is no right to a trial by jury in the district court. *Ibid.*

No right vests until the statement of consent has been adjudged sufficient, and one who has signed the general statement may, before action is taken thereon, withdraw his consent and by proper written notice and request to the board annul his former act in affixing his signature. *Ibid.*

The sufficiency of the statement of consent may be passed upon by the board of

supervisors at an adjourned meeting provided for at a regular meeting of the board. *Butterfield v. Treichter*, 113-328.

Notice of the hearing should be given ten clear days before the hearing, it is not necessary that notice be given ten days before the first day of the regular session of the board. *Ibid.*

The poll lists do not show in what towns the voters resided, and therefore in determining the result of the statement of consent with reference to the number of voters signing, resident in the various towns and townships in the county, the board of supervisors and the court on appeal can receive testimony. *Porter v. Butterfield*, 89 N. W., 199.

The appeal is to be tried by the court without a jury, and it is error to submit the questions of fact to the jury in such a case. *Ibid.*

The costs on appeal are to be taxed against the losing party. *Ibid.*

**SEC. 2451. Forfeiture or revocation.** Whenever any of the conditions of the third preceding section shall be violated, or whenever the council of

the city or town or city acting under special charter shall by a majority vote direct it, or whenever there shall be filed with the county auditor a verified petition, signed by a majority of the voters of the said city, town, or city acting under special charter, or county, as the case may be, as shown by the last general election, requesting it, then the bar to proceedings as provided in the second and third preceding sections shall cease to operate, and the persons engaged in the sale of intoxicating liquors shall be liable to all of the penalties provided in this chapter. [25 G. A., ch. 62, § 19.] [28 G. A., ch. 78, § 1.]

This section does not provide for any action by the board of supervisors with reference to a petition to remove the bar to the enforcement of the prohibitory liquor law which has been declared by the board in determining the sufficiency of the general petition of consent in the county. *Meyer v. Hobson*, 90 N. W., 85.

The sureties on the bond may be liable for unlawful sales, although the seller, purporting to act under the mulct law, has not filed the required consent of the adjoining property owners. *Breeding v. Jordan*, 88 N. W., 1090.

#### SEC. 2455. Additional taxes and regulations.

[For earlier annotations, see code, page 864.—Ed.]

The bond required by Code § 2448, Par. 3, does not cover payments required to be made by the city ordinance. *Ottumwa v. Hodge*, 112-430.

A city has no authority to provide by ordinance for the punishment of the act of

keeping a saloon open on election day, as prohibited in Code § 2448. Such provision would be inconsistent with the criminal laws of the state. *Iowa City v. McInnery*, 114-586.

### CHAPTER 8.

#### OF THE BUREAU OF LABOR STATISTICS.

**SECTION 2470. Duties—report.** The duties of said commissioner shall be to collect, assort, systematize and present in biennial reports to the governor statistical details relating to all departments of labor in the state, especially in its relations to the commercial, social, educational and sanitary conditions of the laboring classes, the means of escape from, and the protection of life and health in factories, the employment of children, the number of hours of labor exacted from them and from women, and to the permanent prosperity of the mechanical, manufacturing and productive industries of the state; and he shall, as fully as practicable, collect such information and reliable reports from each county in the state, the amount and condition of the mechanical and manufacturing interests, the value and location of the various manufacturing and coal productions of the state, also sites offering natural or acquired advantages for the profitable location and operation of different branches of industry; he shall, by correspondence with interested parties in other parts of the United States, impart to them such information as may tend to induce the location of mechanical and producing plants within the state, together with such other information as shall tend to increase the productions, and consequent employment of producers; and in said biennial report he shall give a statement of the business of the bureau since the last regular report, and shall compile and publish therein such information as may be considered of value to the industrial interests of the state, the number of laborers and mechanics employed, the number of apprentices in each trade, with the nativity of such laborers, mechanics' and apprentices' wages earned, the savings from the same, with age and sex of laborers employed, the number and character of accidents, the sanitary condition of institutions where labor is employed, the restrictions, if any, which are put upon apprentices when indentured, the proportion of married laborers and mechanics who

live in rented houses, with the average annual rental, and the value of property owned by laborers and mechanics; and he shall include in such report what progress has been made with schools now in operation for the instruction of students in the mechanic arts, and what systems have been found most practical, with details thereof. Such report shall not contain more than six hundred printed pages, and shall be of the number, and distributed in the manner, provided by law. [20 G. A., ch. 132, § 5.] [29 G. A., ch. 97, § 1.]

**SEC. 2471. Power to secure evidence—witness fees—how paid.**

The commissioner of the bureau of labor statistics shall have the power to issue subpoenas, administer oaths and take testimony in all matters relating to the duties herein required by said bureau, said testimony to be taken in some suitable place in the vicinity to which testimony is applicable. Witnesses subpoenaed and testifying before the commissioner of the bureau shall be paid the same fees as witnesses before a justice's court, such payment to be made out of the general funds of the state on voucher by the commissioner, but such expense for witnesses shall not exceed one hundred dollars annually. Any person duly subpoenaed under the provisions of this section, who shall wilfully neglect or refuse to attend or testify at the time and place named in the subpoena, shall be deemed guilty of a misdemeanor, and, upon conviction thereof before any court of competent jurisdiction, shall be punished by a fine not exceeding fifty dollars and costs of prosecution, or by imprisonment in the county jail not exceeding thirty days: *provided*, however, that no witness shall be compelled to go outside the county in which he resides to testify. [26 G. A., ch. 86, § 2; 20 G. A., ch. 132, § 6.] [29 G. A., ch. 97, § 2.]

**SEC. 2472. Right to enter premises—violation or neglect—written notice—prosecution.** The commissioner of the bureau of labor statistics shall have the power, upon the complaint of two or more persons, or upon his failure to otherwise obtain information in accordance with the provisions of this chapter, to enter any factory or mill, workshop, mine, store, business house, public or private work, when the same is open or in operation, upon a request being made in writing, for the purpose of gathering facts and statistics such as are contemplated by this chapter, and to examine into the methods of protection from danger to employes, and the sanitary conditions in and around such buildings and places, and make a record thereof. If the commissioner shall learn of any violation of, or neglect to comply with the law in respect to the employment of children, or in respect to fire escapes, or the safety of employes, or for the preservation of health, he shall give written notice to the owner or person in charge of such factory or building, of such offense or neglect, and if the same is not remedied within sixty days after service of such notice, such officer shall give the county attorney of the county in which such factory or building is situated, written notice of the facts, whereupon that officer shall immediately institute the proper proceedings against the person guilty of such offense or neglect. And any owner or occupant of such factory or mill, workshop, mine, store, business house, public or private work, or any agent or employe of such owner or occupant, who shall refuse to allow any officer or employe of said bureau to so enter, or who shall hinder him, or in any way deter him from collecting information, shall be deemed guilty of a misdemeanor, and, upon conviction thereof before any court of competent jurisdiction, shall be punished by a fine of not exceeding one hundred dollars and costs of prosecution, or by imprisonment in the county jail not exceeding thirty days. [26 G. A., ch. 86, § 3.] [29 G. A., ch. 97, § 3.]

## CHAPTER 9.

## OF MINES AND MINING.

**SECTION 2479-a. Repeal by striking out—board of examiners—** That chapter nine (9), title twelve (12) of the code be and the same is hereby amended by striking out section twenty-four hundred and seventy-nine (2479) and inserting in lieu thereof the following:

The executive council shall appoint a board of five examiners consisting of two practical miners and two mine operators, all holding certificates of competency as mine foremen, at least one of whom shall also hold a certificate of competency as hoisting engineer, and one mining engineer, each of whom shall have had at least five years actual experience in his profession immediately preceding his appointment, who shall hold office for a term of two years. The members of said board shall qualify by taking oath to perform the duties devolving upon them fairly, faithfully and impartially, without fear or favor, uninfluenced by personal or political considerations. No member of said board shall be interested in or connected with any school, scheme, plan or device having for its object the preparation, education or instruction of persons in the knowledge required of applicants for certificates of competency. Any member of said board shall be summarily removed from office by the executive council, upon due notice and hearing, for violation of the law, misfeasance or malfeasance in the performance of his duties, or for other sufficient cause, and his successor shall thereupon be appointed by the said executive council for the unexpired term. [29 G. A., ch. 98, § 1.]

**SEC. 2482. Inspection districts—powers and duties of inspector.** The governor shall divide the state into three inspection districts, and assign one inspector to each district, who shall devote his entire time to his work, and, before entering thereon, procure, to be paid for by and to belong to the state, all instruments necessary for the discharge of his duties, including a complete set of standards, balances and other means of adjustment in testing any and all apparatus used in weighing, and shall examine, test and adjust, as often as occasion demands, all scales, beams and other apparatus used in weighing coal at the mines. He shall examine all the mines in his district as often as the time will permit, which examination shall be made at least once in every six (6) months of all mines having an average output of fifty tons or more of coal per day, keep a record of the inspections made, showing date, the condition in which the mine is found, the extent and manner in which the laws relating to the government of mines and their operation are observed and obeyed, the progress made in improvements for the better security to health and life, number of accidents happening and their character, the number employed, and such other and further matters as may be of public interest and connected with the mining industries of the state. He shall have the right at all reasonable times, by night or by day, to enter any mine in his district, or any district to which he may be sent by the governor, for the purpose of ascertaining its condition and the manner of its operation, by making personal examination and inquiry in relation thereto, but not so as to unnecessarily obstruct or impede the working of the mines; and to this end the mine owner or person in charge shall furnish such mine inspector all assistance in his power, and forthwith, upon the happening of any accident to any miner in or about the mine by reason of the working thereof which causes loss of life, shall report the same, by mail or otherwise, to the mine inspector and the coroner of the county. Each inspector shall have and maintain, at some suitable place in his district, to be approved by the governor, an office, and shall reside in the district and remain therein, unless otherwise engaged in the conduct of his official duties. [22 G. A., ch. 54, § 2; 21 G. A., ch. 140, §§ 1, 2, 6; 20 G. A., ch. 21, §§ 1, 2, 6.] [29 G. A., ch. 99, § 1.]

**SEC. 2483. General office—report to governor—compensation.**

The three inspectors shall maintain a general office in the capitol, and keep therein all records, correspondence, documents, apparatus or other property pertaining to their office; they shall meet in said office biennially on or before August fifteenth preceding the regular session of the general assembly, and make report to the governor of their official doings, including therein all matters which by this chapter are specially committed to their charge, adding such suggestion as to needed future legislation as in their opinion may be important. Each inspector shall receive for his services the sum of fifteen hundred dollars per annum and actual traveling expenses, not exceeding seven hundred and fifty dollars yearly, the traveling expenses to be paid quarterly upon an itemized statement duly verified and audited by the state auditor. [22 G. A., ch. 52, § 1; 21 G. A., ch. 140, §§ 3, 4; 20 G. A., ch. 21, §§ 3, 4.] [28 G. A., ch. 79, § 1.]

**SEC. 2488. Ventilation.** The owner or person in charge of any mine shall provide and maintain, whether the mine be operated by shaft, slope or drift, an amount of ventilation of not less than one hundred cubic feet of air per minute for each person, nor less than five hundred cubic feet of air per minute for each mule or horse employed therein, which shall be so circulated throughout the mines as to dilute, render harmless and expel all noxious and poisonous gases in all working parts of the same; [But in no case shall the air current be a greater distance than sixty feet from the working face, except when making cross cuts in entries for an air-course; then in that case the distance shall not be greater than seventy feet, provided, however, that the district mine inspector may in writing grant permission to go beyond the limit herein mentioned when the conditions are such in a special case as to require it. When the air current is carried to the working face of the rooms, in double-room mining, such air current shall be treated as that contemplated in this act.] to do this, artificial means by exhaust-steam, forcing-fans, furnaces, or other contrivances of sufficient capacity and power, shall be kept in operation. If a furnace is used, it shall be so constructed, by lining the up-cast for a sufficient distance with incombustible material, that fire cannot be communicated to any part of the works. When the mine inspector shall find the air insufficient, or the men working under unsafe conditions, he shall at once give notice to the mine owner or his agent or person in charge, and, upon failure to make the necessary changes within a reasonable time, to be fixed by him, he may order the men out, to remain out until the mine is put in proper condition. [22 G. A., ch. 56, § 3; 20 G. A., ch. 21, § 10.] [27 G. A., ch. 59, § 1.]

[The portion of the above section inclosed in brackets is inserted therein by the provisions of chapter 59, acts of the 27th G. A., but unless inclosed in brackets the wording of the section as amended would be imperfect.—Ed.]

Failure of a mine owner to so far work will render him liable. *Mosgrove v. Zimbleman Coal Co.*, 110-169.  
remove or dilute noxious gases as to render the mine a safe place for the miners to

**SEC. 2489. Safety appliances—competent engineers—boys not employed.**

[For earlier annotations, see code, page 873.—Ed.]

Whether a roof which is in a dangerous condition should be propped by the miner or by the mine owner is to be determined by the jury with reference to whether it is the roof of a room under the charge of the miner, or of an entry for the safety of which the mine owner is responsible. *Taylor v. Star Coal Co.*, 110-40.

**RELATING TO EXAMINATION OF MINE FOREMEN, PIT BOSSES AND HOISTING ENGINEERS.**

**SEC. 2489-a. Certificate of competency.** That from and after January 1st, 1901, it shall be unlawful for any person to discharge, or

attempt to discharge, any of the duties of mine foreman, pit boss, or hoisting engineer at any coal mine, whose daily output is in excess of twenty-five tons, unless he shall hold a certificate of competency for such position as provided in this act. But in case of the discharge, resignation, or disability of any person lawfully performing such duties the owner, agent, operator, or managing officer of said mine shall have a reasonable time within which to secure the services of a certificated person to take the place of the one so discharged, resigned, or disabled; and during such time a competent and capable person, whether certificated as provided in this act or not, may be temporarily employed to perform such services. [28 G. A., ch. 82, § 1.]

**SEC. 2489-b. How procured.** Any person may secure the certificate of competency herein provided for by appearing before the board created by section twenty-four hundred and seventy-nine (2479) of the code for the examination of state mine inspectors, and submitting to such examination as to his qualifications, or producing such evidence of service, as required by this act. [28 G. A., ch. 82, § 2.]

**SEC. 2489-c. Board of examiners to adopt rules—compensation.** The board of examiners referred to in the last preceding section shall meet at such times and places, shall adopt such rules, conditions, and regulations, and shall prescribe and conduct such examinations as shall be most efficient to give effect to the spirit and intent of this act. The members of said board shall each receive the sum of five dollars per day for every day actually employed in the discharge of the duties imposed herein, together with their actual expenses incurred in the performance of such duties, which expenses shall be itemized and verified as provided by section 2480 of the code, but they shall not be allowed compensation for more than seventy days in any one year. [28 G. A., ch. 82, § 3.]

**SEC. 2489-d. Certificates of competency—how issued.** The certificate of competency herein provided shall be issued (1) to any person who shall satisfactorily pass such examination, written or oral, as may be prescribed by said board; (2) to any person who shall produce satisfactory evidence that he has for a period of four years immediately preceding the examination, continuously and capably performed the duties of mine foreman, pit boss, or hoisting engineer as the case may be. [28 G. A., ch. 82, § 4.]

**SEC. 2489-e. Fees—certificates recorded.** Every person applying for a certificate under this act shall pay to said examining board a fee of two dollars, and every successful applicant shall pay to said board an additional fee of two dollars; all of said fees to be accounted for and covered into the state treasury. Each certificate issued under this act shall be recorded in the office of the examining board, and shall show the name, age, residence, and years of experience of the person to whom it was issued. [28 G. A., ch. 82, § 5.]

**SEC. 2489-f. Penalty.** No owner, agent, operator, or managing officer of any coal-mine to which this act applies shall employ any mine foreman, pit boss, or hoisting engineer who does not hold the certificate herein contemplated. And any person violating any of the provisions of this act shall be punished by fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both fine and imprisonment, in the discretion of the court. [28 G. A., ch. 82, § 6.]

**SEC. 2490. Scales and weighers—records—payment in money.** The owner or operator shall, if the miners are paid by weight, provide the mine with suitable scales of standard make, and require the person selected to weigh the coal delivered from the mine to be sworn before some person authorized to administer oaths, to the effect that he will keep the scales correctly and truly balanced, and accurately weigh and a true record keep of each car delivered, which oath, with that of the check-weighman hereinafter provided for, shall be conspicuously displayed with record of weights at the

place of weighing, which record shall carry the account of each miner by itself, be open to the inspection at all proper times of miners and all others having a pecuniary interest in the mine, and all damages sustained on account of a failure to weigh and credit to the proper person any coal mined shall be recoverable in an action brought within two years from the time the right thereto accrued, and a knowledge of a violation of this provision by the miner shall not be a defense thereto. The miners employed and working in any mine may furnish a competent check-weighman, who, before entering upon his duties, shall make and subscribe to an oath to the effect that he is duly qualified and will faithfully discharge his duties as check-weighman, and he shall at all proper times have access to and the right to examine the scales, machinery or apparatus used in weighing and seeing all measures and weights of coal mined and the accounts kept thereof; but not more than one person on the part of the miners collectively shall have this right, and such examination and inspection shall be so made as to create no unnecessary interference with the use of such scales, machinery or apparatus. The owner or agent shall, where the miner is by contract to be paid by the ton or other quantity, unless otherwise agreed upon in writing, weigh the coal before screening, and the miner shall be credited at the rate of eighty pounds to the bushel and two thousand pounds to the ton, but no payment shall be demanded for sulphur, rock, slate, black-jack, dirt or other impurities which may be loaded or found with the coal. Where ten or more miners are employed, such owner or agent shall not sell, give, deliver or issue, directly or indirectly, to any person employed, in payment for labor due or as advances for labor to be performed, any script, check, draft, order or other evidence of indebtedness payable or redeemable otherwise than in money at the face value, and he shall not compel or in any manner endeavor to coerce any employe to purchase goods or supplies from any particular person, firm, company or corporation; but all wages shall be paid in money upon demand semi-monthly, by paying for those earned during the first fifteen days of each month not later than the first Saturday after the twentieth of said month, and for those earned after the fifteenth of each month not later than the first Saturday after the fifth of the succeeding month. A failure or refusal to make payment within five days after demand shall entitle the laborer to recover the amount due him, and one dollar per day additional for each day such payment is neglected or refused, not exceeding the sum due, and in any action therefor the court shall tax as a part of the costs a reasonable attorney fee to plaintiff's attorney. [25 G. A., ch. 98; 22 G. A., ch. 53, §§ 1-3; 22 G. A., ch. 54, §§ 1, 3; 22 G. A., ch. 55, § 1.] [28 G. A., ch. 80, § 1.] [28 G. A., ch. 81, § 1.]

Section applied. *Mitchell v. Burwell*, 110-10.

**SEC. 2494. Penalty.** Any person, firm or corporation, either by themselves, agents or employes, selling or offering to sell for illuminating purposes in any mine in this state any adulterated or impure oil, or oil not recognized by the state board of health as suitable for illuminating purposes as contemplated in this chapter, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than twenty-five dollars nor more than one hundred dollars for each offense; and any mine owner or operator or employe of such owner or operator who shall knowingly use, or any mine operator who shall knowingly permit to be used, for illuminating purposes in any mine in this state any impure or adulterated oil, oil that has not been inspected and approved by an inspector, or any oil the use of which is forbidden by this chapter, shall, upon conviction thereof, be fined not less than five dollars nor more than twenty-five dollars. [26 G. A., ch. 92, § 2.] [27 G. A., ch. 60, § 1.]

**SEC. 2495-a. Repeal—testing oil.** That section twenty-four hundred and ninety-five (2495) be stricken out and the following substituted therefor:

It shall be the duty of an inspector of petroleum products to inspect and test all oil offered for sale, sold, or used for illuminating purposes in coal mines in this state, and for such purpose he may enter upon the premises of any person. If upon test and examination the oil shall meet the requirements made and provided by the state board of health, he shall brand, over his own official signature and date, the barrel or vessel holding the same with the words "Approved for illuminating coal mines." Should it fail to meet such requirements, he shall brand it over his official signature and date, "Rejected for illuminating coal mines." All inspection shall be made within this state, and paid for by the person for whom the inspection is made at the rate of ten cents per barrel or vessel, which charge shall be a lien on the oil inspected, and be collected by the inspector. Each inspector shall be governed in all things respecting his record, compensation, expenses, and returns to the treasurer of state and secretary of state as provided in sections twenty-five hundred and six and twenty-five hundred and seven of the code. It shall be the duty of the inspector whenever he has good reason to believe that oil is being sold or used in violation of the provisions of this chapter to make complaint to the county attorney of the county in which the offense was committed, who shall forthwith commence proceedings against the offender in any court of competent jurisdiction. All reasonable expenses for analyzing suspected oil shall be paid by the owner of the oil whenever it is found that he is selling or offering to sell impure oil in violation of the provisions of this chapter. Such expenses may be recovered in a civil action, and in criminal proceedings such expenses shall be taxed as part of the costs. [27 G. A., ch. 60, § 2.]

**SEC. 2495-b. Shot examiners—proof of competency.** In all mines, where the coal is blasted from the solid, competent persons shall be employed to examine all shots, before they are charged. Said examiners to have the power to prohibit the charging and firing of any shot which, in their judgment, is unsafe. Before entering upon the discharge of their duties, said examiners shall give proof of their competency to the state mine inspector of the district in which the mine, where they are employed, is located, and said inspector shall certify to the operator of each mine the persons who have given proof of their competency to act in the capacity of shot examiners. The state mine inspector to have the power to refuse to give permission to any person to act as shot examiner who, in his judgment, is not sufficiently competent; or he may revoke the permission granted, should it appear that a shot examiner is negligent, or careless in the performance of his work. [29 G. A., ch. 100, § 1.]

## CHAPTER 11.

### OF INSPECTION OF PETROLEUM PRODUCTS.

**SECTION 2503. Inspectors—appointment of deputies.** The governor shall appoint such number of inspectors of the products of petroleum as may be determined by the state board of health, not to exceed fourteen in number. Each inspector shall be a resident of the state, and not interested directly or indirectly in the manufacture or sale of products of petroleum. His term of office shall begin on the first day of July in each even-numbered year. He shall give bond to the state in the penal sum of five thousand dollars, conditioned for the faithful performance of his duties, with sureties who shall, in addition to the usual justification, make oath, entered on the bond, that they are not directly or indirectly interested in the manufacture or sale of products of petroleum for illuminating purposes, which bond shall be for the benefit of all persons injured through the failure of the inspector to perform his duties, and shall be filed with, and the sureties thereon approved by, the secretary of state. Where there are two or more

inspection stations, under the jurisdiction of the same inspector, he may with the approval of the governor appoint a deputy or deputies, each of whom shall be a resident of the state and not interested directly or indirectly in the manufacture or sale of petroleum products, for all of whose official acts the principal shall be responsible, and who shall serve without additional compensation or expense to the state. [21 G. A., ch. 149, § 4; 20 G. A., ch. 185, §§ 1, 3, 12, 14.] [27 G. A., ch. 61, § 1.]

#### SEC. 2505. Inspection—branding—fees.

The failure of the seller to label a vessel containing gasoline sold to a customer, as required by this section, held to constitute negligence *per se* so as to render the seller liable for injuries sustained by an infant daughter of the purchaser in using the gasoline to start a fire, under the belief that it was the ordinary form of coal oil. *Ives v. Weiden*, 114-476.

#### SEC. 2507. Compensation of inspectors—expenses.

Where an oil inspector dies after having rendered services for part of a month and his successor completes the service for that month, each is entitled to the maximum salary for that part of a month during which he has served. *State v. Dyer*, 106-640.

SEC. 2508. Use of gasoline lamps—penalties—damages. If any person, company or corporation, or agent thereof, shall sell, or attempt to sell, any product of petroleum for illuminating purposes which has not been inspected and branded as in this chapter provided, or shall falsely brand any barrel or package containing such petroleum product, or shall refill with products of petroleum barrels or packages having the inspector's brand thereon, without erasing such brand and having the contents thereof inspected, and the barrel or package rebranded, or shall purchase, sell or dispose of any empty barrel or package without thoroughly removing the inspection brand, or shall knowingly or negligently sell, or cause to be sold, or shall use or cause to be used, any product of petroleum mentioned in this chapter not inspected and tested, except as otherwise authorized herein; or if any person shall adulterate with any substance for the purpose of sale or use any product of petroleum to be used for illuminating purposes in such a manner as to render it dangerous, or shall sell or offer for sale, or use any product of petroleum for illuminating purposes which will emit a combustible vapor at a temperature of less than one hundred and five degrees, standard Fahrenheit thermometer, closed test, except as otherwise provided in this section for illuminating railway cars, boats and public conveyances, and except when the oils from which said gas or vapor is generated in closed reservoirs outside the building to be lighted thereby, and except the lighter products of petroleum when used in such lamps or apparatus which, having been submitted to the state board of health and having been examined and tested by said board, shall be found to be safe for the use of the public and for street light by street lamps, shall be fined not less than ten dollars nor more than fifty dollars, or if any common carrier shall receive for transportation or transport in the state as freight any oil or fluid, whether composed wholly or in part of petroleum or its products, or of any substance which will ignite at a temperature of three hundred degrees Fahrenheit thermometer, open test; or if any such carrier of passengers shall burn any oil or fluid which will ignite at a temperature of three hundred degrees, for lighting any lamp, vessel or fixture of any kind in any railway passenger, baggage, mail or express car, or boat or street railway car, stage coach, or other means of public conveyance; or if any inspector shall falsely brand any barrel or package, or shall practice any fraud or deceit in office, or be guilty of any official misconduct or culpable negligence to the injury of another, or shall deal or have any pecuniary interest, directly or indirectly, in any oils or fluids sold for illuminating purposes while holding such office, he or such person, company, corporation or agent shall be fined not less than fifty dollars,

and shall be liable in a civil action for all damages which may be sustained on account thereof, and each such inspector shall be fined in a sum not less than ten dollars nor more than one thousand dollars, or imprisoned in the county jail not exceeding six months, or be punished by both fine and imprisonment. [21 G. A., ch. 149, § 3; 20 G. A., ch. 185, §§ 1, 6, 7, 8, 10, 11, 13.] [27 G. A., ch. 62, § 1.] [28 G. A., ch. 83, § 1.] [29 G. A., ch. 101, § 1.] [29 G. A., ch. 168, § 1.]

[For earlier annotations, see code, page 878.—Ed.]

The exception of the proviso in this section as to the "Welsbach Hydrocarbon Incandescent Lamp" is unconstitutional as attempting to confer a special privilege, but the whole section is not invalid

on that account, as the exception is not necessary to the completeness of the general statutory provision which had been in force prior to the attempt to incorporate the exception. *State v. Santee*, 111-1.

**SEC. 2508-a. Duties of state board of health.** The state board of health shall examine the particular design, mechanism, and workmanship of such lamps or apparatus as shall be presented to such board, and test said lamps or apparatus, and, if it shall find any lamp or apparatus to be safe, said board shall enter the findings of the board upon the records of the proceedings of said board. The board shall have power, in case it comes to the notice of the board that any lamp or apparatus which it has heretofore approved as safe, because either of change of design, the use of unsuitable material, or poor workmanship in the construction of such lamps or apparatus, or for any other cause, is unsafe as then manufactured, and dangerous to public safety, to cancel its approval of such lamp or apparatus, and after such cancellation of the approval of said lamp or apparatus, it shall be unlawful to use the same, and no lamps or apparatus manufactured or sold after such disapproval shall be used in burning the lighter products of petroleum for illuminating purposes. [28 G. A., ch. 83, § 2.] [29 G. A., ch. 168, § 1.]

## CHAPTER 11-A.

### OF THE MANUFACTURE AND SALE OF LINSEED OIL, THE ADULTERATION THEREOF AND PENALTY.

**SECTION 2510-a. Manufacture—sale.** No person, firm, or corporation shall manufacture or mix for sale, sell, or offer for sale, as raw linseed oil, any article which is not wholly the product of commercially pure linseed or flaxseed. Nor shall any person, firm, or corporation manufacture or mix for sale, sell, or offer for sale, as boiled linseed oil, any article, unless the oil from which said article is made be wholly the product of commercially pure linseed or flaxseed, and unless the same has been heated to at least two hundred and twenty-five (225) degrees Fahrenheit. [27 G. A., ch. 52, § 1.]

**SEC. 2510-b. Compounds excepted.** Nothing in this act shall be construed as prohibiting the sale or manufacture of any compound of linseed or flaxseed oil; provided, that such compound, if it imitates in appearance and is designed to take the place of linseed or flaxseed oil, shall not be manufactured or mixed for sale, sold, or offered for sale under a name or description containing the words "linseed oil" or "flaxseed oil." [27 G. A., ch. 52, § 2.]

**SEC. 2510-c. Penalty.** Any person, firm, or corporation who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished for each and every such violation, by a fine of not less than fifty (\$50) dollars, nor more than five hundred (\$500) dollars; and in default of the payment of such fine shall

be committed to the county jail for a period of not less than thirty (30) days. [27 G. A., ch. 52, § 3.]

**SEC. 2510-d. Duties and powers of inspectors and board of health.** It shall be the duty of the inspectors of petroleum products, under such rules and regulations as the state board of health may prescribe, to enforce the provisions of this act. The violation of any of the provisions of this act relating to the manufacture and adulteration of linseed or flaxseed oil is hereby declared to be a public nuisance, and any court of competent jurisdiction is authorized, upon application of the board of health or its agents, to enjoin such violation, in the same manner as injunctions are usually granted under the rules and practice of such court. The board, its inspectors, assistants, experts, and chemists, and others appointed by it, shall have access, ingress, and egress to and from all places of business and buildings where linseed or flaxseed oil is kept for sale, stored or manufactured. They shall also have the power and authority to open any tank, barrel, can, or other vessel containing such oil, and may inspect the contents thereof, and take samples therefrom for analysis. All clerks, bookkeepers, express agents, railroad agents, or officials, employes of common carriers, or other persons, shall render them all the assistance in their power, when so requested, in tracing, finding, or inspecting such oil. [27 G. A., ch. 52, § 4.]

**SEC. 2510-e. Cost of analysis—county attorney.** It shall be the duty of the court in every action brought under this act to tax as costs in the cause the actual and necessary expense of analyzing the linseed or flaxseed oil which shall be in controversy in such proceeding; provided, that the amount so taxed shall not exceed the sum of twenty-five (\$25) dollars. It shall be the duty of the county attorney, upon the application of the state board of health, to attend to the prosecution in the name of the state of any suit brought for violation of any of the provisions of this act within his county. [27 G. A., ch. 52, § 5.]

The secretary of state has no authority to require inspectors to collect samples of oil to be sent to him for analysis, and a libel published by an inspector while securing samples for the secretary of state is a trespass in his private capacity for which the sureties on his official bond are not liable. *Witte v. Weinstein*, 88 N. W., 349.

## CHAPTER 12.

### OF THE INSPECTION OF PASSENGER BOATS.

**SECTION 2512. Certificates—fees.** Any inspector, on the request of the owner, agent or master of any boat other than row-boat, upon the inland waters of the state having a carrying capacity of five or more passengers, shall carefully and thoroughly inspect such boat, its appliances and machinery, and, if found in proper condition and safe for the carriage of persons or passengers, give his certificate thereof, including therein the number of persons or passengers that may be carried, and on what waters; which certificate, or a copy thereof, shall be posted in a conspicuous place on the boat, and any boat so inspected and certified shall be entitled to run for the season following the date thereof. In like manner, upon the request of any pilot or engineer for a license as such, the inspector shall forthwith investigate the competency of the applicant, his acquaintance with and experience in his business, his habits as to sobriety, and other qualifications, and, if found capable of performing well his duties, and of good habits, he shall issue his certificate authorizing him to act as pilot or engineer, as the case may be, for five years from the date thereof, unless sooner revoked for cause, which revocation when made shall take effect upon approval by the governor. The

inspector may charge and require advance payment for inspection, for each sailboat, one dollar, each boat propelled by other power with a capacity of not more than twenty persons, five dollars, those of greater capacity, ten dollars, and for each applicant for license as pilot or engineer, three dollars. [22 G. A., ch. 107, §§ 3-5.] [28 G. A., ch. 84, § 1.]

**SEC. 2513. Penalties.** If any owner, agent or master of any such boat, having a capacity of carrying five or more persons, plying the inland waters of the state, shall hire, or offer to hire, such boat for the carrying of persons, or receive persons thereon for hire, without first obtaining annually, before the boating season, a certificate as in this chapter required, or if such owner, agent or master, having obtained such certificate, shall permit or receive for carriage on such boat a greater number of persons than authorized therein, or if any person shall act as pilot or engineer on any boat mentioned for which inspection and license are herein required, without first obtaining a license therefor, or if, having such license, he continues to follow such avocation after the same has been revoked, or has expired, he shall be fined in a sum not exceeding one thousand dollars, or imprisoned in the county jail not exceeding one year, or punished by both fine and imprisonment; but the provisions of this chapter shall not apply to vessels licensed by authority of the United States. [22 G. A., ch. 107, §§ 1, 3, 4.] [28 G. A., ch. 84, § 2.]

**SEC. 2514. Reports.** Each inspector annually, on or before the first day of January, shall report to the governor the number and date of licenses granted pilots or engineers, to whom issued, the date thereof, the number and kind of boats inspected, the time and place of inspection, upon what waters to be used, and such other matters as may be considered useful or of general interest, with the total amount of fees received from all sources. [22 G. A., ch. 107, § 6.] [28 G. A., ch. 84, § 3.]

## CHAPTER 13.

### OF THE DAIRY COMMISSIONER AND IMITATION DAIRY PRODUCTS.

**SECTION 2515. Appointment, bond, powers and duties of commissioner—office deputy—assistant—salaries—expenses—report.** On or before the first day of April of each even-numbered year, the governor shall appoint a dairy commissioner, who shall have a practical knowledge of and experience in the manufacture of dairy products, and hold his office for two years from the first day of May following his appointment, and until his successor is appointed and qualified, subject to removal by the governor for inefficiency, neglect or violation of duty. He shall give bond in the sum of ten thousand dollars, conditioned for the faithful performance of his duties, with sureties to be approved by and filed with secretary of state. He shall keep on hand a supply of standard test tubes or bottles and milk measures or pipettes adapted for use by each milk testing machine, the manufacturers or dealers of which have filed with the dairy commissioner a certificate from the director of the Iowa agricultural experiment station, which shall certify that said milk testing machine, when properly and correctly operated, will produce accurate measurements of butter fat, and furnish to any person or corporation desiring the same for testing milk one such tube or bottle, and such milk measure or pipette for each factory, of the kind adapted for the machine operated therein, upon request therefor, certifying it to be accurate, reliable and standard, placing thereon the letters "D. C." as a permanent mark; the tubes or bottles and pipettes to be furnished at the actual cost thereof. He shall have and keep an office in the capitol, and preserve therein all correspondence, documents, records and property of the

state pertaining thereto, and may, when necessary, employ an office deputy at a salary of ten hundred dollars per year; the dairy commissioner may also appoint, upon the recommendation of the president of the Iowa state college of agriculture and mechanic arts, the director of the Iowa experiment station and the professor of dairying, one assistant, who shall perform such duties as may be assigned to him by the dairy commissioner, and who shall receive a salary of ten hundred dollars per year, and said deputy and assistant of the dairy commissioner shall be allowed, in addition to their salaries, actual and necessary traveling expenses when in the performance of their official duties, said expenses to be itemized, verified under oath, and when audited and approved by the executive council to be paid upon warrants of the state auditor upon the state treasurer, *provided*, that such expenditures shall not exceed the appropriation made for the dairy commissioner's office. During his term of office he shall hold no other official position nor any professorship in any state educational institution, and on or before the first day of November shall make annual report to the governor, which shall contain a detailed account of all his doings as commissioner, and the receipts and disbursements of his office since the preceding report, with such facts and statistics in regard to the production, manufacture and sale of dairy products, with such suggestions, as he may regard of public importance connected therewith. In the conduct of his office, he shall have power to issue subpoenas for witnesses, enforce their attendance, and examine them under oath by him to be administered, such witnesses to be allowed fees as in justices' courts, to be paid by the commissioner as part of the expenses of his office, and do such other acts and things as are necessary and proper in the enforcement of the provisions of this chapter. [25 G. A., ch. 47; 24 G. A., ch. 50, § 6; 23 G. A., ch. 52, § 5; 22 G. A., ch. 98, § 1; 21 G. A., ch. 52, §§ 11-14.] [28 G. A., ch. 85, § 1.]

**SEC. 2522. Milk dealers—manufacturers and packers—reports—penalty.** Every city milk dealer, or every person furnishing milk or cream to such dealer, or the employe of such milk dealer, and every person or corporation, or the employe of such person or corporation, who operates a creamery, cheese or condensed milk factory, or re-works or packs butter, shall maintain his premises and utensils in a clean and hygienic condition, and shall make, upon blanks furnished by the dairy commissioner, such reports and statistics as may be required for the purpose of compiling statistics authorized by this chapter, and such dealer, owner, operator or business manager shall make such returns and reports within thirty days after receiving the proper blank form from the dairy commissioner and shall certify to the correctness thereof. Whoever shall violate any provision of this section shall be punished by a fine of not less than twenty-five nor more than one hundred dollars, or by imprisonment in the county jail for not more than thirty days. [29 G. A., ch. 102, § 1.]

## CHAPTER 14.

### OF STATE VETERINARY SURGEON.

**SECTION 2536. Appropriation.** There is annually appropriated out of any moneys, not otherwise appropriated, the sum of [three] five thousand dollars, or so much thereof as may be necessary, for the uses and purposes herein set forth. [20 G. A., ch. 189, § 8.] [27 G. A., ch. 63, § 1.]

[Chapter 63 of the acts of the 27th G. A., amends, or attempts to amend, the above section, by "striking out the word 'three' in the third line and inserting the word 'five' in lieu thereof," but there is no word three in the *third* line.—Ed.]

## CHAPTER 14-A.

## OF THE PRACTICE OF VETERINARY MEDICINE, SURGERY AND DENTISTRY.

**SECTION 2538-a. Unlawful practice.** That it shall be unlawful for any person to practice veterinary medicine, surgery, or dentistry in this state, who shall not have complied with the provisions of this act. [28 G. A., ch. 93, § 1.]

**SEC. 2538-b. Repeal—existing practitioners—registration.** Section two (2) of chapter ninety-three (93) of the acts of the twenty-eighth general assembly is hereby repealed and the following enacted in lieu thereof:

Any person of good moral character who has practiced the profession of veterinary medicine, surgery and dentistry in this state for a period of five years immediately preceding the passage of the act of which this is an amendment shall be deemed eligible to registration as an existing practitioner upon presenting to the board of veterinary medical examiners, created by the act of which this is an amendment, satisfactory evidence that such person is of good moral character and that such person had actually practiced veterinary medicine, surgery and dentistry in the state of Iowa for a period of five years immediately preceding the passage of the act of which this is an amendment, application for such registration to be made before July 4, 1902. [29 G. A., ch. 170, § 1.]

**SEC. 2538-c. Graduates.** Any person who is a graduate of a legally chartered and authorized veterinary college or veterinary department of any university or agricultural college, at the time of the passage of this act, or who shall hold a diploma from such institutions prior to 1901, shall be entitled to registration as an existing practitioner upon the presentation of his diploma, duly verified. All applications for such registration to be made before July 4, 1902. [28 G. A., ch. 93, § 3.] [29 G. A., ch. 170, § 2.]

**SEC. 2538-d. State board of veterinary medical examiners—term—vacancies.** The governor of the state shall appoint a board of examiners within sixty days after the passage of this act; said board to be known as the state board of veterinary medical examiners. This board shall consist of three qualified veterinarians, residents of the state, each of whom shall be a graduate of a legally chartered and authorized veterinary college or veterinary department of any university or agricultural college, and who shall be of good standing in the profession. One of these members shall be appointed for one year; one for two years; and each succeeding appointment shall be for three years. Each shall hold office until his successor is duly appointed and qualified. No member of any veterinary college or veterinary department of the state university or agricultural college, or any person connected therewith, shall be eligible to appointment upon said board. The governor shall fill any vacancy which shall occur on the board, and may remove any member of said board for continued neglect of duty, for incompetency, unprofessional, or dishonorable conduct. [28 G. A., ch. 93, § 4.]

**SEC. 2538-e. Powers of board.** This board shall have power to make all needed regulations for its government and proper discharge of its duties in accordance with this act, and shall have power to administer oaths, and take testimony concerning all matters within its jurisdiction. It shall also have the power to revoke any certificate issued by it when it is shown that such certificate was procured by false representation or where good cause for revocation of such certificate has arisen since the issuance thereof. [28 G. A., ch. 93, § 5.] [29 G. A., ch. 170, § 3.]

**SEC. 2538-f. Meetings.** The meetings of the examining board shall be held at least once a year, or at such times and places as it may elect. At any meeting of the board, a majority shall constitute a quorum to transact business, or to conduct examinations. [28 G. A., ch. 93, § 6.]

**SEC. 2538-g. Certificate of qualification.** Said board shall receive applications for registration, according to sections two and three of this act, and shall issue a certificate of qualification to all applicants who conform to the requirements for such registration, signed by the members of the board, provided that the certificate thus granted specifically and plainly states whether or not the one to whom it is granted is a graduate or non-graduate in veterinary medicine. Such certificate shall be conclusive as to the rights of the lawful holder of the same to practice veterinary medicine, surgery, or dentistry in this state. [28 G. A., ch. 93, § 7.]

**SEC. 2538-h. Registration fee.** The fee for registration shall be five dollars (\$5), payable in advance to the secretary of the board. [28 G. A., ch. 93, § 8.]

**SEC. 2538-i. Qualifications—examination—fee—license.** From and after January 1st, 1901, any person not authorized to practice veterinary medicine, surgery, and dentistry in this state, and desiring to enter upon such practice, shall be a graduate of a legally chartered and recognized veterinary college or veterinary department of a university or agricultural college, and shall pass the examination required by said state board of veterinary medical examiners. The fee for such examination shall be fifteen dollars (\$15) payable in advance to the secretary of the board. The applicant shall be at least twenty-one years of age and of good moral character. Any person conforming to these requirements shall receive a license to practice veterinary medicine, surgery, or dentistry within this state, signed by the members of the board, which license shall be recorded in the office of the recorder of the county in which said person resides, the recording fee to be paid by holder of certificate. [28 G. A., ch. 93, § 9.] [29 G. A., ch. 170, § 4.]

**SEC. 2538-j. Register—treasurer to hold fees—bond—vouchers.** The board shall keep a register of all registered practitioners in the state, setting forth such facts as the board shall see fit. All fees accruing under this act shall be held by the treasurer of the board, who shall execute good and sufficient bond to said board to faithfully discharge his duties, and who shall pay out such funds, only, on vouchers, certified by a majority of said board. [28 G. A., ch. 93, § 10.]

**SEC. 2538-k. Compensation—expenses.** Each member of said board shall be entitled to receive five dollars (\$5) per diem, also actual and necessary traveling expenses, incurred while actually engaged in the discharge of his official duties, provided such compensation and expenses do not exceed said income of fees accruing under this act. [28 G. A., ch. 93, § 11.]

**SEC. 2538-l. Penalty.** Any person violating any of the provisions of this act shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars, or by imprisonment in the county jail for a period of not more than thirty days for each and every such offense. It shall be the duty of the county attorney of the county in which violation occurs to conduct all proceedings against violators of this act. [28 G. A., ch. 93, § 12.]

**SEC. 2538-m. Exceptions.** Nothing in this act shall be construed to apply to commissioned veterinarians in the United States Army or to persons who dehorn cattle, or castrate domestic animals, or to persons who gratuitously treat diseased animals. [28 G. A., ch. 93, § 13.]

**SEC. 2538-n. Further penalty.** Any person who shall, without having been authorized so to do legally, append any veterinary title to his name, or shall assume or advertise any veterinary title in such a manner as to convey the impression that he is a lawful practitioner of veterinary medicine or any of its branches, shall be guilty of a misdemeanor, and punished according to the provisions of section twelve (12) of this act. [28 G. A., ch. 93, § 14.]

**SEC. 2538-o. Re-examinations.** In case the examination of any person shall prove unsatisfactory and his name be not registered, he shall be per-

mitted to present himself for re-examination within any period not exceeding twelve months next thereafter, and no charges shall be made for re-examination. [28 G. A., ch 93, § 15.]

**SEC. 2538-p. Board to render an account to executive council.** The board shall render under oath annually on January first to the executive council an account of all fees collected and per diem expenses paid, and pay over the balance into the state treasury. [28 G. A., ch. 93, § 16.]

## CHAPTER 15.

### OF THE CARE AND PROPAGATION OF FISH AND THE PROTECTION OF BIRDS AND GAME.

**SECTION 2539. Warden—compensation—duties—seizure without warrant—sale.** There is hereby created the office of state fish and game warden. The warden shall be appointed by the governor, and hold his office for three years from the first day of April of the year of his appointment. He shall receive a salary of twelve hundred dollars annually to be paid out of the state treasury. He shall have charge and management of the state fish hatcheries, which shall be used in stocking the waters of the state with fish native to the country and to the extent of the means provided by the state. He shall impartially and equitably distribute all fry raised by or furnished to the state, or for it through other sources, in the streams and lakes of the state; shall faithfully and impartially enforce obedience of the provisions of this chapter, and shall make a biennial report to the governor of his doings, together with such information upon the subject of the culture of fish and the protection of game in the country as he may think proper, accompanied with an itemized statement monthly to the executive council under oath of all moneys expended and for what purpose, and of the number and varieties of fish distributed, and in what waters. It shall be the duty of the fish and game warden, sheriffs, constables, and police officers of this state to seize and take possession of any fish, birds, or animals which have been caught, taken, or killed at a time, in a manner, or for a purpose, or had in possession or under control, or have been shipped, contrary to the provisions of this chapter. Such seizure may be made without a warrant. Any court having jurisdiction of the offense, upon receiving proof of probable cause for believing in the concealment of any fish, birds, or animals, caught, taken, killed, had in possession, under control, or shipped contrary to any of the provisions of this chapter, shall issue a search-warrant and cause a search to be made in any place therefor. Any fish, birds, or animals so found shall be sold for the purpose of paying the costs in the case, and the amount, if any, in excess of the costs shall be turned into the school fund of the county in which the seizure is made. Any net, seine, trap, contrivance, material, and substance whatever, while in use or had and maintained for the purpose of catching, taking, killing, trapping or deceiving any fish, birds, or animals contrary to any of the provisions of this chapter is hereby declared to be, and is, a public nuisance, and it shall be the duty of the fish and game warden, sheriffs, constables, and police officers of the state, without warrant or process, to take or seize any and all of the same. And abate and destroy any and all of the same without warrant or process and no liability shall be incurred to the owner or any other person for such seizure and destruction and said warden or his regularly constituted deputies or other peace officers as hereinbefore named shall be released from all liability to any person or persons whomsoever for any act done or committed or property seized or destroyed under or by virtue of this section. [23 G. A.,

ch. 34, § 12; 17 G. A., ch. 80, §§ 1, 4.] [27 G. A., ch. 64, § 1.] [29 G. A. ch. 103, § 1.]

**SEC. 2539-a. Repeal.** That section five (5) of chapter sixty-four (64) of the laws of the twenty-seventh (27th) general assembly be and the same is hereby repealed. [29 G. A., ch. 103, § 3.]

**SEC. 2540. Fishing—what permitted.** Between the first days of November and March, no one shall take from the waters of the state any salmon or trout, nor between the first day of November and the fifteenth day of May any bass, pike, croppies, pickerel, or catfish, or other game fish, nor shall any one person take of said fish from the waters of the state in any one day more than forty (40) of any or all of said kinds of fish, nor shall any one fish for or by any means catch any fish in any stream, which has been stocked with breeding trout one or two years old, within one year from the date of the stocking thereof, if notice of such fact is by the authority of the warden posted where a public road crosses such stream; nor shall any one at any time take from the waters of the state any fish, except minnows for bait, unless by hook and line; but any person may, between the fifteenth day of May and the first day of December, use not more than one trot line in streams only, and extending not more than half-way across; nor shall any one place, erect or cause to be placed or erected, any trot line, seine, net, trap, dam or other device or contrivance in the water in such manner as to hinder or obstruct the free passage of fish, up, down or through the same for the purpose of catching them, except as provided in the next section; nor have, erect or use, while fishing on or through the ice, any house, shed or other protection against the weather, or have or use any stove or other means for creating artificial heat. The possession of a spear or seine in or upon any of the public waters of the state, or upon the ice of the same, or on the shore within a limit of ten rods, or the taking or killing of any fish by any means within three hundred (300) feet of a fish-way shall be unlawful.

No person shall, at any time, kill, destroy, have in possession or under control, for any purpose whatever, any black bass, catfish, wall-eyed pike, or trout less than six (6) inches in length, except for the purpose of returning the same to the water from which they were taken, as soon as they are taken therefrom, with as little injury to the fish as possible. [26 G. A., ch. 80, § 1; 25 G. A., ch. 65; 23 G. A., ch. 34, §§ 2, 3, 6, 7; 17 G. A., ch. 80, §§ 5, 6; 16 G. A., ch. 70, § 6.] [27 G. A., ch. 64, §§ 2, 4.] [29 G. A., ch. 103, §§ 2, 4.]

[For earlier annotations, see code, page 885.—Ed.]

Fish and game are so related to the public welfare that they have, time out of mind, been the subjects of legal control, and their preservation has ever been a matter of legislative concern. Statutes relating to the preservation of fish and game are an abridgment of otherwise legal rights of the owners of the soil in taking fish and game thereon. *State v. Beardsley*, 108-396; *State v. Meek*, 112-338.

**SEC. 2540-a. Explosives—drugs—penalty.** It shall be unlawful for any one to place in the waters of the state any lime, ashes, or drug of any kind or other substance, explode dynamite, gun cotton, giant powder or other compound or preparation or use electricity in any way with the intent to kill or so to affect any fish that it may be taken and any one guilty of any of said acts shall, upon conviction thereof be fined not less than fifty (\$50.00) dollars nor more than one hundred (\$100.00) dollars or imprisoned in the county jail not less than fifteen nor more than thirty days. [29 G. A., ch. 103, § 5.]

**SEC. 2546. Taking by warden—written permits.** The warden may take from any of the public waters of the state, at any time and in any manner, any fish for the purpose of propagating or re-stocking other waters, or exchanging with fish commissioners or wardens of other states or of the United States. Provided, further, that the warden may, upon proper application in writing, made upon blanks furnished by said warden, issue to

whomsoever he may see fit, written permits, upon blank forms to be furnished by said warden, suspending for a specified period specified portions of this chapter relating to fishing and authorizing the person to whom said permit is issued, to take from certain designated portions of the waters of the state, buffalo, carp, quillbacks, red-horse, suckers and gar, as in said permit named, in any quantities and for all purposes, provided, however, that no such permit holder shall be authorized to exercise the rights granted in said permit except in the presence and under the supervision of the warden or one or more of his regularly constituted deputies, without expense to the state. [23 G. A., ch. 34, § 2.] [29 G. A., ch. 103, § 6.]

The warden has no authority to take, private ponds. *State v. Sears*, 87 N. W., or empower others to take, fish from the 735. public waters for the purpose of stocking

**SEC. 2547. Rivers excepted--dams.** Nothing herein contained shall be held to apply to fishing in the Mississippi or Missouri rivers, nor to so much of the Des Moines river as forms the boundary line between this state and Missouri, nor to forbid the erection of dams across the waters of the state for manufacturing or other lawful purposes, subject to the provisions of the following section. [Same, § 11; 18 G. A., ch. 92; 16 G. A., ch. 70, § 10.] [29 G. A., ch. 104, § 1.]

**SEC. 2548. Fish ways.**

The legislature may provide for the passage of fish along, and their protection in, unnavigable as well as navigable waters. *State v. Beardstey*, 108-396.

One who acquires the right to maintain a dam by grant from the state is subject, without reservation in the grant, to the subsequent control of the legislature as to the construction of fishways. *State v. Meek*, 112-338.

But where, in an action before a justice of the peace having jurisdiction, it was determined that the owner of the dam was not liable for a violation of the statute in not maintaining a fishway, on the ground that by reason of the grant from the state the statute was not applicable to him, and this judgment was not appealed from, held that this constituted a prior adjudication. *Ibid.*

**SEC. 2551. Game protected.** No person shall trap, shoot or kill any pinnated grouse or prairie chicken between the first day of December and the first day of September next following; any woodcock, between the first day of January and the tenth day of July; any ruffed grouse or pheasant, wild turkey or quail, between the first day of January and the first day of November; any wild duck, goose or brant, rail, plover, sandpiper and marsh or beach bird, between the fifteenth day of April and the first day of September; or any gray or fox squirrel or timber squirrel, between the first day of January and the first day of September, provided that it shall be unlawful to kill any ruffed grouse or wild turkey prior to January 1, 1900. Shooting or killing quail on the public highway shall be in violation of law. No person shall kill any of the birds mentioned in this section from any artificial ambush of any kind or with the aid or use of any sneak boat or sink box or other device used for concealment in the open water, nor use any artificial light, battery or any other deception, contrivance or device whatever, with the intent to attract or deceive any of the birds mentioned in this chapter, except that decoys may be used in hunting wild geese and ducks, but no person shall at any time hunt or shoot from any boat, canoe, contrivance or device whatever on any of the waters of this state between sunset and sunrise. [20 G. A., ch. 67; 18 G. A., ch. 193; 17 G. A., ch. 156, § 2.] [27 G. A., ch. 66, § 1.] [29 G. A., ch. 103, § 7.]

**SEC. 2551-a. What prohibited.** That it shall be unlawful for any person other than the owner, or person authorized by the owner, to kill, maim, trap, or in any way injure or capture any deer, elk, or goat except when distrained as provided by law. [27 G. A., ch. 65, § 1.]

**SEC. 2551-b. Penalty.** Any person violating the provisions of this act shall be deemed guilty of a misdemeanor and be punished by imprisonment in the county jail for a period not exceeding thirty (30) days or by a fine not exceeding one hundred (100) dollars, or by both such fine and imprisonment. [27 G. A., ch. 65, § 2.]

**SEC. 2556. Penalty—what animals.** If any person use any device, kill, trap, ensnare, buy, sell, ship, or have in his possession, or ship, take or carry out of the state, contrary to the provisions of this chapter, any of the birds or animals named or referred to herein, or shall wilfully destroy any eggs or nests of the birds named or referred to in the preceding sections, he shall be punished by a fine of ten dollars for each bird, beaver, mink, otter, or muskrat, or other animals named or referred to in this chapter; and ten dollars for each nest and the eggs therein, so killed, trapped, ensnared, bought, sold, shipped, had in possession, destroyed, or shipped, taken, or carried out of the state, and shall stand committed to the county jail for thirty days unless such fine and costs of prosecuting are sooner paid. [17 G. A., ch. 156, § 7.] [29 G. A., ch. 103, § 8.]

**SEC. 2559. Prosecutions—attorney's fee—opinions of attorney-general.** In all prosecutions under this chapter, any number of violations may be included in the information, but each one shall be set out in a separate count, and upon conviction there shall be taxed as a part of the costs in the case a fee of five dollars to the informant, and a like fee of five dollars to the attorney prosecuting the case, upon each count upon which there is a plea or verdict of guilty and judgment of conviction; but in no event shall this fee be paid out of the county treasury. Prosecutions for violations of any provision of this chapter may be brought either in the county in which the offense was committed, or in any other county where the person, company or corporation complained of has had or has in his or their possession any fish, birds or animals named herein and bought, sold, caught, taken, killed, trapped or ensnared in violation hereof. When requested by the fish and game warden the attorney-general shall give his opinion, in writing, upon all questions of law pertaining to the office of such warden. Nothing in this chapter shall be construed as prohibiting any person from instituting legal proceedings for the enforcement of any provisions hereof. [17 G. A., ch. 156, § 11.] [27 G. A., ch. 64, § 3.]

**SEC. 2561. Protection of birds.** No person shall destroy the nests or eggs of, or catch, take, kill or have in possession or under control for any purpose whatever, except specimens for use of taxidermists, at any time, any whippoorwill, night-hawk, bluebird, finch, thrush, linnnet, lark, wren, martin, swallow, bobolink, robin, turtle-dove, catbird, snowbird, blackbird, or any other harmless bird except bluejays and English sparrows, but nothing herein shall be construed to prevent the removal of nests from buildings, and the keeping of song birds in cages as domestic pets. Any person violating any of the provisions of this section shall be fined not less than one dollar nor more than twenty-five dollars and costs of prosecution, and may be committed to the county jail until such fine and costs are paid. [29 G. A., ch. 103, § 9.]

## CHAPTER 15-A.

### IN RELATION TO PROTECTION OF GAME.

#### NON-RESIDENTS.

**SECTION 2563-a. License for non-residents.** That it shall be unlawful for any person not a bona fide resident of the state of Iowa to pursue, hunt or kill any game bird or animal in the state of Iowa at any time without

first procuring a license therefor from the county auditor of the county in which said game is pursued, hunted, or killed. [28 G. A., ch. 86, § 1.]

**SEC. 2563-b. How issued—fees.** It shall be the duty of the county auditor of such county to issue a license to any person a non-resident of the state of Iowa, whom he shall find to be a careful and prudent person and accustomed to the use of fire-arms, to pursue, hunt, and kill game in the county named in such license during the open season, for any term hereafter not exceeding one year ending on the first day of January next succeeding the issuance of the license, upon the payment of the sum of ten (\$10) dollars to the county treasurer as a license fee and the sum of fifty (50) cents to the county auditor for issuing a license, which may be revoked by the county auditor at any time for good cause shown. [28 G. A., ch. 86, § 2.]

**SEC. 2563-c. Application filed.** Any non-resident person who may desire such a license shall file an application with the county auditor properly sworn to, stating the name, age, occupation, and place of residence of the applicant, and the name of the county for which such license is wanted, and pay the fees as provided in section two (2) of this act. [28 G. A., ch. 86, § 3.]

**SEC. 2563-d. Restrictions.** Any such non-resident who may thus have obtained such a license shall be authorized thereby to hunt, pursue, or kill game in the county named therein, but not on the enclosed or cultivated lands of another without a permit in writing from the owner and only during the open season while such license is in force, and shall be authorized thereby to take from the state not to exceed twenty-five (25) game birds or animals of all kinds killed by himself or herself, which shall be carried openly for inspection with his or her license. [28 G. A., ch. 86, § 4.]

**SEC. 2563-e. Penalty.** That if any non-resident person shall pursue, hunt, or kill any game bird or animal in the state of Iowa, without such license or after the same has been revoked or at any time except during the open season, or if any non-resident person shall violate any of the provisions of this act, he or she shall be guilty of a misdemeanor and upon conviction shall be fined not less than twenty-five (25) dollars nor more than one hundred (100) dollars for each and every offense and shall stand committed to the county jail until such fine and costs are paid as provided by law in such cases, or be imprisoned in the county jail not to exceed thirty (30) days. [28 G. A., ch. 86, § 5.]

**SEC. 2563-f. Repeal—game protection fund.** That section 6 of an act of the twenty-eighth general assembly, entitled "An act to protect game and to provide a fund to pay the expenses of prosecution under this act," be and the same is hereby repealed and the following enacted in lieu thereof:

That all license money paid or collected under this act shall be credited by the county treasurer to a fund known as a game protection fund, to be used to defray the expenses of enforcing the law for the protection of game, such expenses to be allowed and ordered paid by the board of supervisors of the county. [28 G. A., ch. 87, § 1.]

**SEC. 2563-g. Form of license.** Such license shall not be transferable, and shall be in the following form:

HUNTER'S LICENSE.

STATE OF IOWA, }  
County of \_\_\_\_\_ }

This is to certify that \_\_\_\_\_ of \_\_\_\_\_ in the state of \_\_\_\_\_ having this day made application for a hunter's license, and having paid therefor the sum of ten dollars (\$10), as required by law, is hereby permitted to pursue, hunt and kill within the county of \_\_\_\_\_ and state of Iowa, but not on the enclosed or cultivated lands of another without a permit in writing from the owner, during the year ending January 1st, A. D.

\_\_\_\_\_, any of the birds and animals protected by the game laws of this state, in conformity with the law under which this license is issued, during the time in said year when the shooting and killing of such birds and animals is not prohibited by law.

In witness whereof I have hereunto subscribed my name, and caused the seal of the county auditor to be affixed hereto, this \_\_\_\_\_ day of \_\_\_\_\_ A. D. \_\_\_\_\_.

\_\_\_\_\_, County Auditor.

[28 G. A., ch. 86, § 7.]

**SEC. 2563-h. How enforced.** It shall be the duty of county attorneys and all peace officers to see that this act is strictly enforced, the same as other game laws of the state. [28 G. A., ch. 86, § 8.]

## CHAPTER 16.

### OF STATE BOARD OF HEALTH.

**SECTION 2564. Appointment—meetings—officers—districts—vacancies—how filled.** The state board of health shall consist of the attorney-general and the state veterinary surgeon, who shall be members by virtue of their offices, one civil engineer and seven physicians, to be appointed by the governor, each to serve for a term of seven years and until his successor is appointed; vacancies to be filled by the governor for the unexpired term. But no one of the seven physicians hereafter appointed shall be an officer or member of the faculty of any medical school, and the governor shall have the power to remove any member of said board for good cause shown. It shall meet semi-annually in May and November, and at such other times as it may decide upon, such meetings to be held at the seat of government; suitable rooms, office supplies and furniture except postage and stationery, therefor to be provided by the custodian of the capitol. At the meeting held in May, a president from their number, and a secretary who shall be a physician not of their number, shall be elected, and the latter have an office in the capitol. For the purposes contemplated in this section the state shall be divided into health districts, numbered and consisting respectively of the counties named as follows:

District No. 1. Allamakee, Butler, Bremer, Black Hawk, Buchanan, Chickasaw, Clayton, Delaware, Fayette, Floyd, Grundy, Howard, Mitchell, Winneshiek.

District No. 2. Benton, Cedar, Clinton, Dubuque, Iowa, Jones, Jackson, Johnson, Linn, Muscatine, Scott.

District No. 3. Appanoose, Davis, Des Moines, Henry, Jefferson, Keokuk, Louisa, Lee, Mahaska, Monroe, Wapello, Washington, Van Buren.

District No. 4. Cerro Gordo, Calhoun, Emmet, Franklin, Hancock, Humboldt, Hamilton, Hardin, Kossuth, Palo Alto, Pocahontas, Webster, Winnebago, Worth, Wright.

District No. 5. Buena Vista, Clay, Cherokee, Dickinson, Ida, Lyon, Osceola, O'Brien, Plymouth, Sioux, Sac, Woodbury.

District No. 6. Audubon, Adair, Cass, Crawford, Carroll, Greene, Guthrie, Harrison, Monona, Pottawattamie, Shelby.

District No. 7. Boone, Dallas, Jasper, Marshall, Madison, Marion, Polk, Story, Tama, Poweshiek, Warren.

District No. 8. Adams, Clarke, Decatur, Fremont, Lucas, Mills, Montgomery, Page, Ringgold, Taylor, Union, Wayne.

When vacancies occur in the state board of health, it shall be the duty of the governor to appoint to membership on the board physicians residing in

the various health districts, until seven such districts are represented on the board. After which time the annual appointment shall be made from the physicians residing in the district not represented on the board the preceding year. [26 G. A., ch. 91; 20 G. A., ch. 173; 18 G. A., ch. 151, §§ 1, 9, 10, 12.] [27 G. A., ch. 67, § 1.] [28 G. A., ch. 88, § 1.]

#### SEC. 2568. Local board of health. Quarantine.

[For earlier annotations, see code, page 890.—Ed.]

The physician appointed as a health officer by a local board of health becomes simply an officer to assist in the administration of the law and the enforcement of the regulations of the board and is not required to treat the sick in his professional capacity. If called into service by the board of health to treat persons infected with contagious disease he is entitled to compensation, although the county may have had a contract with another physician to treat all the paupers of the county. The fact that the patient is a pauper is material in determining who shall pay the

bill and not with reference to who shall perform the services. *Lacy v. Kossuth County*, 106-16.

A certificate of the board of health attached to a physician's claim against the county for compensation for services in treating a person infected with contagious disease is admissible in evidence as a part of the claim for such compensation. *Ibid.*

Beyond the boundaries of the city the board of health of the city has no power or authority, and it cannot establish a small-pox pest house in an adjoining township. *Warner v. Stebbins*, 111-86.

#### SEC. 2570. Care of infected person.

[For earlier annotations, see code, pages 891-2.—Ed.]

This section does not enlarge the territorial limits of the jurisdiction of the city board of health, as specified in Code § 2568, nor authorize a transfer of patients

having contagious diseases to the jurisdiction of the board of health of an adjoining township. *Giles v. Shenandoah*, 111-86.

SEC. 2570-a. Repeal—care of infected person—expenses. That section two thousand five hundred and seventy (2570) of the code is hereby repealed and the following enacted in lieu thereof:

When any person shall be sick or infected with smallpox or other infectious or contagious disease dangerous to the public health, whether a resident or otherwise, the local board of health shall make such provisions as are best calculated to protect the inhabitants therefrom, and may remove such person to a separate house, or to a pest house, or detention or other hospital, and shall provide needful assistance, nurses, medical attendance and supplies. If in the judgment of said board such person cannot be removed, then he shall be cared for at the place where he resides in the same manner as above provided. In case of the removal of more than one person to the same house, or to any pest house, or detention or other hospital, it shall provide needful assistance, nurses, medical attendance and supplies necessary for their proper care. All bills for expenses incurred in carrying out the provisions of this section shall be filed with the clerk of the local board of health, which board shall examine the same and act thereon at its next regular meeting after the same have been filed with the clerk, and certify the amount allowed thereon by it to the county auditor and the county board of supervisors shall act upon said bills as thus certified at its first regular meeting thereafter. The local board of health shall allow an amount on such bills as shall be reasonable and the certificate of the local board of health shall be *prima facie* evidence of the correctness of such bills, but the board of supervisors may revise the amounts so allowed and fix the same. The expenses paid under the provisions of this act and the chapter of which it is amendatory shall in no case exceed the reasonable value of the property furnished or services rendered and the county shall not advance such expenses until the same shall have been audited and allowed by the board of supervisors. When one or more persons shall be confined in a house, or pest house, or detention or other hospital, the local board of health shall ascertain the total amount of

expense incurred for the care of such persons, which amount shall be equitably apportioned by the local board of health between the several persons cared for, and when so apportioned the president, and clerk of said board shall certify to the county auditor the name of such person or persons and their proportionate share, and the county shall recover the same in any court of competent jurisdiction within the state, and the certificate of the president and clerk of said board shall be *prima facie* evidence of the amount furnished such person or persons. In case of the inability of any person or persons, or those liable for their support, to pay for the expenses incurred as provided in this section, such expense shall be paid by the county, and the board of supervisors of said county shall, at the time it levies the general taxes, levy on the property of the city, town or township, from which such expenses were certified a sufficient tax to reimburse the county to the extent of one-third of the amount paid by it under the provisions of this act. In the event that any of the expenses made as aforesaid shall be collected from private individuals after said tax has been levied on the property of the city, town, or township, said city, town, or township shall have credited to them one-third of the amount so collected. It is further provided that nothing herein contained shall be construed to prevent any person quarantined, as herein provided, from employing at his own expense the physician or nurse of his choice, and no part of the expense of the physician or nurse employed by the board of health shall be apportioned to him under the provisions of this act. The forcible removal of infected persons, as herein provided, shall be effected by an application made to any civil magistrate, in the manner provided for the removal and abatement of nuisances, who shall issue the warrant as directed in such cases, to remove such person or persons to the place designated by the local board of health, or to take possession of the condemned or infected houses or lodgings, which warrant shall be executed under the direction of the local board of health, and such officer shall receive a reasonable compensation to be determined and allowed by said board. [29 G. A., ch. 105, § 1.]

[For annotations, see code, page 891.—Ed.]

**SEC. 2570-b. Repeal—quarantine expenses—how paid—levy to reimburse.** All expenses incurred by the local board of health in establishing, maintaining or raising a quarantine, including fumigation, and the building and providing any pest house, detention or other hospital shall be by it certified to and paid by the county in the first instance and the board of supervisors shall at the time of the levy of the taxes for general purposes levy a tax upon the township, town or city, to reimburse the county for the amounts paid by it under the provisions of this section. All acts or parts of acts conflicting with this section are hereby repealed. [29 G. A., ch. 105, § 2.]

**SEC. 2571. Meetings of local board—regulations—reports—expenses—tax.** Local boards of health shall meet for the transaction of business on the first Mondays of April and November in each year, and at such other times as may seem necessary. They shall give notice of all regulations adopted, by publication thereof in some newspaper printed and circulated in the town, city or township, or, if there is none, by posting a copy thereof in five public places therein, and through their physician or clerk shall make general report to the state board at least once a year, and special reports when it may demand them, of its proceedings and such other facts as may be required, on blanks furnished by and in accordance with instructions from it. All expenses incurred in the enforcement of the provisions of this chapter, when not otherwise provided, shall be paid by the town, city or township; in either case all claims to be presented and audited as other demands. In the case of townships, the trustees shall certify the amount required to pay such expenses to the board of supervisors of the

county, and it shall advance the same, and, at the time it levies the general taxes, shall levy on the property of such township a sufficient tax to reimburse the county, which, when collected, shall be paid to and belong to the county. [22 G. A., ch. 65; 18 G. A., ch. 151, §§ 15, 24; C. '73, §§ 416, 420.] [29 G. A., ch. 106, § 1.]

[For annotations, see code, page 892 —Ed.]

**SEC. 2572. Regulations of state board.** Local boards of health shall obey and enforce the rules and regulations of the state board; and peace and police officers within their respective jurisdictions, when called upon to do so by the local boards, shall execute the orders of such board. If any local board of health shall refuse or neglect to enforce the rules and regulations of the state board of health, the state board of health may enforce its rules and regulations within the territorial jurisdiction of such local board, and for that purpose shall have and may exercise all of the powers given by statute to local boards of health; and the peace and police officers of the state, when called upon by the state board of health to enforce its rules and regulations, shall execute the orders of such board. All expenses incurred by the state board of health in determining whether its rules and regulations are enforced by a local board of health, and in enforcing the same when a local board has refused or neglected to do so, shall be paid in the same manner as is now provided for the payment of the expenses of enforcing such rules and regulations by local boards of health. [29 G. A., ch. 107, § 1.]

**SEC. 2575-a. Location of pest houses—controversy—how settled.** That when a controversy arises between municipalities or between boards of health thereof, respecting the location of pest houses or hospitals for the treatment of infectious or contagious diseases, such matter shall be referred to the president of the state board of health who shall forthwith appoint a committee of three (3) members thereof, which committee shall upon two days' notice to the parties interested, investigate the matter and make such order in the premises as the facts warrant, and such order shall be final. [29 G. A., ch. 108, § 1.]

**SEC. 2575-b. Jurisdiction.** The health officers of the municipality which is allowed to maintain a pest house or hospital for patients affected by infectious or contagious diseases outside the limits of said municipality, shall have exclusive jurisdiction and control of such pest house or hospital for the enforcement of all sanitary and health regulations. [29 G. A., ch. 108, § 2.]

#### CHAPTER 16-A.

OF NURSERY STOCK INFESTED WITH THE SAN JOSE SCALE—PUNISHMENT FOR BRINGING INTO THE STATE, AND TO PREVENT THE SPREAD OF THE SCALE.

**SECTION 2575-c. State entomologist—assistants—fees.** The entomologist of the state experiment station is hereby constituted the state entomologist and charged with the execution of this act. He may appoint such qualified assistants as may be necessary, fix a reasonable compensation for their labor, and pay the same; and their acts shall have the same validity as his own. He shall, by himself, or his assistants, between the first day of June and the fifteenth day of September, in each year, when requested by the owner or agent or where he has reasonable grounds to believe the scale exists, carefully examine any nursery, fruit farm, or other place where trees or plants are grown for sale, and if found apparently free from the scale, he shall issue his certificate stating the facts, and shall collect therefor a fee of not less than five dollars, nor more than fifteen dollars, according to the amount of stock inspected. It shall be unlawful to sell, or offer for trans-

portation, any nursery stock outside the county where said nursery stock is grown unless accompanied by a copy of this certificate. [27 G. A., ch. 53, § 1.]

**SEC. 2575-d. Quarantine—treatment—collection of cost.** The state entomologist shall have authority, when requested by the owner or agent, or when he has reasonable grounds to believe the scale exists, to enter upon any grounds, public or private, for the purpose of inspection, and, if he finds any nursery, orchard, garden, or other place infested by the scale, he may, by himself or his assistants, enter upon such premises and establish quarantine regulations. If in his judgment the scale may be eradicated by treatment, he may, in writing, order such treatment, and prescribe its kind and character. In case any trees, shrubs, or plants are found so infested that it would be impracticable to treat them, he may order them burned. A failure for ten days after the delivery of such order to the owner or persons in charge to treat or destroy such infested trees or plants, as ordered, shall authorize the entomologist to perform this work by himself or his assistants, and to ascertain the cost thereof. He shall certify the amount of such cost to the owner or person in charge of the premises, and if the same is not paid to him within sixty days thereafter he shall certify the amount to the county auditor, who shall spread the same upon the tax books, to be collected as other taxes are, and turned over to the entomologist to become a part of the fund for carrying this act into effect. [27 G. A., ch. 53, § 2.]

**SEC. 2575-e. Inspection of nursery stock shipped into state.** Where nursery stock is shipped into this state, accompanied by a certificate as herein provided, it shall be held *prima facie* evidence of the facts therein stated, but the state entomologist, by himself or his assistants, when they have reason to believe any such stock is infested with the scale, shall be authorized to inspect the same and subject it to like treatment as provided in section two of this act. [27 G. A., ch. 53, § 3.]

**SEC. 2575-f. Certificate of inspection—penalties.** It shall be unlawful for any person, firm, or corporation to bring into the state any trees, plants, vines, cuttings, and buds, commonly known as nursery stock unless accompanied by a certificate of inspection by a state entomologist of the state from which the shipment was made, showing that the stock has been inspected and found apparently free from the scale. Any person violating or neglecting to carry out the provisions of this act, or offering any hindrance to the carrying out of this act, shall be adjudged guilty of a misdemeanor and upon conviction before a justice of the peace shall be fined not less than ten dollars, nor more than one hundred dollars, for each and every offense, together with all the costs of the prosecution, and shall stand committed until the same are paid. All amounts so recovered shall be paid over to the state entomologist, and added to the fund herein provided for the carrying out the provisions of this act. [27 G. A., ch. 53, § 4.]

**SEC. 2575-g. Compensation.** The state entomologist shall be allowed and paid for his services while engaged in this work, all his necessary traveling expenses and the sum of five dollars per day. All funds coming into his hands shall be paid over to the state treasurer, with an itemized statement of the source whence received. He shall certify the amount of his expenses and per diem to the auditor of state, who shall thereupon draw his warrant upon the treasurer of state for the amount, which shall be paid out of the funds provided for carrying this act into effect. [27 G. A., ch. 53, § 5.]

**SEC. 2575-h. Appropriation.** There is hereby appropriated out of any moneys not otherwise appropriated, the sum of one thousand dollars (\$1,000), or so much thereof as may be necessary, for carrying out the provisions of this act. [27 G. A., ch. 53, § 6.]

## CHAPTER 17.

## OF THE PRACTICE OF MEDICINE.

**SECTION 2576. Board of medical examiners—examinations—certificates.** The state board of medical examiners shall consist of the physicians of the state board of health, and the secretary of the board of health shall be secretary thereof. It shall hold regular meetings in May and November and special ones as may be necessary, due notice thereof being given, at which it shall discharge the duties contemplated by this chapter. All examinations shall be in writing, each candidate for examination in any school of medicine being given the same set of questions, covering anatomy, physiology, general chemistry, pathology, surgery and obstetrics. In materia medica, therapeutics and the principles and practice of medicine, a set of questions shall be used corresponding to the school of medicine which the applicant desires to practice. The examination papers, when concluded, shall be marked upon a scale of one hundred, each candidate for examination first to pay to the secretary of the board a fee of ten dollars therefor. The average required to pass shall be fixed by the board prior to the examination. Each applicant shall, upon obtaining an order for examination, receive from the secretary a confidential number which he shall place upon his work when completed, so that the board, in passing thereon, shall not know by whom it was prepared. All matters connected therewith shall be filed with the secretary and preserved for five years as a part of the records of the board, during which time they shall be open to public inspection. If the examination is satisfactory to five members of the board, it shall issue its certificate, under its seal, signed by its president, secretary, and not less than three other members, who may, in the absence of the others, act as an examining board, and the different schools of medicine represented in the board of health shall be represented in said number. The certificate, while in force, shall confer upon the holder the right to practice medicine, surgery and obstetrics, and be conclusive evidence thereof. In all examinations made or proceedings had pursuant to the provisions of this chapter, any member of the board may administer oaths and take testimony in any manner authorized by law. Any one failing in his examination shall be entitled to a second one, within three months thereafter, without further fee. If any person shall by notice in writing apply to the secretary of the board for an examination or a re-examination, and it fails or neglects for three months thereafter to give him the same, he may, notwithstanding any provision of this chapter, practice medicine until the next regular meeting of the board without the required certificate. [22 G. A., ch. 66; 21 G. A., ch. 104, §§ 1-3.] [28 G. A., ch. 89, § 1.]

[For earlier annotations, see code, page 894.—Ed.]

When the question of license arises collaterally in a civil action between the physician and one who employes him, due qualification under the statute will be pre-

sumed and the burden will be upon him who denies such license. *Lacy v. Kossuth County*, 106-16.

**SEC. 2578. Refusal of certificate—revocation.**

[For earlier annotations, see code, page 894.—Ed.]

The state board of examiners may revoke a certificate on account of "incompetency." The person whose right is involved should in such case be given a fair opportunity to meet the charges and evidence against him, but it is not neces-

sary that the evidence be strictly confined to that which would be admissible in a court. Affidavits may be considered. *Traer v. State Board of Medical Examiners*, 106-559.

**SEC. 2579. Who deemed practitioner.**

[For earlier annotations, see code, page 895.—Ed.]

These statutory directions as to qualifications for the practice of medicine are not unconstitutional on the ground that they grant to some citizens or classes of citizens privileges or immunities which on the same terms are not equally granted to all. The statute merely establishes a rule of evidence by which qualifications to practice medicine shall be ascertained. *State v. Bair*, 112-466.

**SEC. 2581. Itinerant physician.** Every physician practicing medicine, surgery or obstetrics, or professing or attempting to treat, cure or heal diseases, ailments or injuries by any medicine, appliance or method, who, by himself, agent or employe goes from place to place, or from house to house, or by circulars, letters or advertisements solicits persons to meet him for professional treatment at places other than his office at the place of his residence, shall be considered an itinerant physician; and any such itinerant physician shall, in addition to the certificate elsewhere provided for in this chapter, procure from the state board of medical examiners a license as an itinerant, for which he shall pay to the treasurer of state, for use of the state of Iowa, the sum of two hundred and fifty dollars per annum. Upon payment of this sum, the secretary shall issue to the applicant therefor a license to practice within the state, as an itinerant physician, for one year from the date thereof. The board may, for satisfactory reasons, refuse to issue such license, or may cancel such license upon satisfactory evidence of incompetency or gross immorality. Any person practicing medicine as an itinerant physician, as herein defined, without having procured such license shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than three hundred dollars, nor more than five hundred dollars, and costs, and shall be committed to the county jail until such fine is paid: *provided*, however, that nothing herein shall be construed to prevent any physician otherwise legally qualified from attending patients in any part of the state to whom he may be called in the regular course of business, or in consultation with other physicians. [29 G. A., ch. 109, § 1.]

**SEC. 2582. Examination and diploma required.** From and after January 1, 1899, all persons beginning the practice of medicine in the state of Iowa must submit to an examination as set forth in this chapter, and, in addition thereto, shall present diplomas from medical colleges recognized as in good standing by the state board of medical examiners, and all persons receiving their diplomas subsequent to January 1, 1899, shall present evidence of having attended four full courses of study of not less than twenty-six weeks each, no two of which shall have been given in any one year. The state board of medical examiners shall examine the graduates of the medical departments of the state university of Iowa and of such other medical colleges in this state as are recognized by said board of medical examiners as being in good and legal standing at the annual medical commencement and at the location of said state university and other medical colleges respectively. [28 G. A., ch. 89, § 2.]

**SEC. 2583. Fees—compensation—expenses of board.** Each member of the board of examiners shall receive, out of the fund created by the payment of fees by applicants for examination or certificates, the sum of eight dollars for each day, and necessary traveling expenses, for the time he is actually engaged in the discharge of his duties as a member of the board, and the secretary shall receive a sum not to exceed twenty-five (\$25.00) dollars per month and his necessary expenses incurred for services which cannot be performed at the capitol. All printing, postage, and other contingent office expenses necessarily incurred under the provisions of this chapter, shall be paid from said fund. Any balance of said funds remaining shall be

turned over to the state treasurer for the use of the school fund. [22 G. A., ch. 66; 21 G. A., ch. 104, § 6.] [27 G. A., ch. 68, § 1.] [28 G. A., ch. 90, § 1.]

## CHAPTER 17-A.

### OF THE PRACTICE OF OSTEOPATHY.

**SECTION 2583-a. Diploma—examination—certificate.** Any person holding a diploma from a legally incorporated school of osteopathy, recognized as of good standing by the Iowa Osteopathic association, and wherein the course of study comprises a term of at least twenty (20) months, or four (4) terms of five (5) months each, in actual attendance at such school, and which shall include instruction in the following branches, to wit: Anatomy including dissection of a full lateral half of the cadaver, physiology, chemistry, histology, pathology, gynecology, obstetrics and theory of osteopathy and two full terms of practice of osteopathy, shall, upon the presentation of such diploma to the state board of medical examiners and satisfying such board that he is the legal holder thereof, be granted by such board an examination on the branches herein named, (except upon the theory and practice of osteopathy until such time as there may be appointed an osteopathic physician on the state board of health and of medical examiners). The fee for said examination, which shall accompany the application, shall be ten dollars (\$10) and the examination shall be conducted in the same manner, and at the same place and on the same date that physicians are examined as prescribed by section twenty-five hundred and seventy-six (2576) of the code. The same general average shall be required as in cases of physicians; provided that osteopaths who are graduates of legally incorporated schools of osteopathy as above recognized, and who are at the time of the passage of this act engaged in the practice of osteopathy in Iowa, shall be entitled to receive a certificate upon the payment of the prescribed fee without such examination. Upon passing a satisfactory examination as above prescribed the said board of medical examiners shall issue a certificate to the applicant therefor, signed by the president and secretary of said board, which certificate shall authorize the holder thereof to practice osteopathy in the state of Iowa. This certificate when issued shall be registered with the recorder of the county in which the holder thereof resides and for which he shall pay a fee of fifty cents (50c). And the holder thereof shall not be subject to the provisions of section two thousand five hundred eighty (2580) of the code. [29 G. A., ch. 158, § 1.]

**SEC. 2583-b. Drugs—major or operative surgery.** The certificate provided for in the foregoing section shall not authorize the holder thereof to prescribe or use drugs in his practice, nor to perform major or operative surgery. [29 G. A., ch. 158, § 2.]

**SEC. 2583-c. Revocation of certificate.** The board of medical examiners may refuse to grant a certificate to any person otherwise qualified, who is not of good moral character. For like cause, or for incompetency, or habitual intoxication, or upon satisfactory evidence by affidavit or otherwise that a certificate had been granted upon false and fraudulent statements as to graduation or length of practice, the said board may revoke a certificate by an affirmative vote of at least five (5) members of the board, which number shall include one or more members of the different schools of medicine represented in said board. After the revocation of a certificate, the holder thereof shall not practice osteopathy, surgery, or obstetrics in the state. [29 G. A., ch. 158, § 3.]

**SEC. 2583-d. Fraudulent diploma—false representation—penalties.** Any person who shall present to the board of medical examiners a fraudulent or false diploma, or one of which he is not the rightful owner, for the purpose

of procuring a certificate as herein provided, or shall file, or attempt to file, with the recorder of any county in the state the certificate of another as his own, or who shall falsely personate any one to whom a certificate has been granted by such board, or shall practice osteopathy, surgery or obstetrics in the state without first having obtained and filed for record the certificate herein required, and who is not embraced in any of the exceptions contained in this chapter, or who continues to practice osteopathy, surgery or obstetrics after the revocation of his certificate, is guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than three hundred dollars (\$300), nor more than five hundred dollars (\$500) and costs of prosecution, and shall stand committed to the county jail until such fine is paid; and whoever shall file or attempt to file with the recorder of any county in the state the certificate of another with the name of the party to whom it was granted or issued erased, and the claimant's name inserted, or shall file or attempt to file with the board of medical examiners any false or forged affidavit of identification, shall be guilty of forgery. [29 G. A., ch. 158, § 4.]

**SEC. 2583-e. Itinerant osteopath—license.** Every person practicing osteopathy, or obstetrics, or professing to treat, cure or heal diseases, ailments or injury by any osteopathic application or method, who goes from place to place, or from house to house, or by circulars, letters or advertisements solicits persons to meet him for professional treatment at places other than his office at the place of his residence, shall be considered an itinerant osteopath; and such itinerant osteopath shall, in addition to the certificate elsewhere provided for in this chapter, procure from the state board of medical examiners a license as an itinerant, for which he shall pay to the treasurer of state, for use of the state of Iowa, the sum of two hundred and fifty dollars (\$250) per annum. Upon payment of this sum, the secretary shall issue to the applicant therefor a license to practice within the state, as an itinerant osteopath, for one year from the date thereof. The board may, for satisfactory reasons, refuse to issue such license, or may cancel such license upon satisfactory evidence of incompetency or gross immorality. [29 G. A., ch. 158, § 5.]

**SEC. 2583-f. Acts in conflict—repeal.** All acts and parts of acts in conflict herewith are hereby repealed. [29 G. A., ch. 158, § 6.]

## CHAPTER 18.

### OF PRACTICE OF PHARMACY.

#### SECTION 2585. Secretary and treasurer.

Under a prior statute making no provision for a treasurer of the commission, held that a person appointed treasurer by the commission was not a public officer. *State v. Spaulding*, 102-639.

#### SEC. 2588. Registered pharmacists.

[For earlier annotations, see code, page 897.—Ed.]

A registered pharmacist having a permit to sell intoxicating liquors is not liable for the payment of the mulct tax although he sells in violation of his permit. *In re Assignment of Shonkweiler*, 104-67.

A pharmacist selling liquor so compounded with other substances as to lose its distinctive character as an intoxicant, and to be no longer desirable for use as a stimulating beverage, and in fact a medicine, does not violate the prohibitory law, although he may be a permit holder, as provided in Code § 2385. He is not required in such cases to take written requests. *State v. Gregory*, 110-624.

In an action against a person conducting a drug store for negligence of a clerk in compounding a prescription, it is no

defense that the clerk was a registered pharmacist, although the principal was restricted to registered pharmacists in the employment of clerks. *Burgess v. Sims Drug Co.*, 114-275.

**SEC. 2589. Examinations—registration.** The commission, at such times and places as it may select and in such manner as it may determine upon, shall examine all persons desiring to engage in and conduct business as registered pharmacists as contemplated in the preceding section, and, if found competent, the applicant's name shall be entered in the registry book of certificate holders. Graduates of pharmacy holding a diploma from the state university, or from any school or college of pharmacy requiring a course of study and laboratory work equivalent to that prescribed by the said state university in its catalogue for the year 1897-98, may be registered without examination. Pharmacists thus registered have the sole right to keep and sell all medicines and poisons, except intoxicating liquors. [22 G. A., ch. 71, § 20; 21 G. A., ch. 83, § 2; 18 G. A., ch. 75, §§ 5, 8.] [27 G. A., ch. 70, § 1.]

[For annotations, see code, page 893.—Ed.]

**SEC. 2593. Sale of poisons.**

The provisions of this section have no application to the sale of phosphorous, and a pharmacist is not liable in damages for selling that substance without direction as to the care to be exercised in handling it. *Gibson v. Torbert*, 88 N. W., 443.

TO REGULATE THE SALE OF COCAINE.

**SEC. 2596-a. Sale of cocaine.** No one, by himself, clerk, employe or agent, shall either directly or indirectly, sell or give away any cocaine, or preparation containing cocaine, except on the written prescription of a registered physician for medical purposes, and no such prescription shall be refilled except upon the written order of a physician. However, nothing in this act shall be construed to prevent the sale thereof to a wholesale or retail dealer in drugs nor registered physician, or licensed dentist for use in the practice of his profession. [29 G. A., ch. 110, § 1.]

**SEC. 2596-b. Penalty.** Any one found guilty of violating the provisions of section one of this act, for the first offense, shall pay a fine of not less than twenty-five dollars and not more than one hundred dollars and cost of prosecution. For the second offense, and each subsequent offense, he shall pay on conviction thereon, a fine of not less than one hundred dollars, and not more than three hundred dollars, or imprisonment in the county jail not to exceed three months. Any clerk, employe or agent, violating, or aiding in the violation of section one, shall be charged and convicted as principal. [29 G. A., ch. 110, § 2.]

**SEC. 2596-c. Enforcement.** Peace officers shall see that the provisions of this act are faithfully executed within their respective jurisdictions, and when they are informed, or have reason to believe that this act has been violated, and the proof thereof can be had, they shall file information to that effect against the offending party before a magistrate, who thereupon shall proceed according to law. The county attorney shall prosecute violators of this act. [29 G. A., ch. 110, § 3.]

[Sec. 2600-a, *infra*, repeals the whole of chapter 19 of the code.—Ed.]

CHAPTER 19-A.

BOARD OF DENTAL EXAMINERS AND PRACTICE OF DENTISTRY.

**SECTION 2600-a. Repeal.** That chapter nineteen (19) of title twelve (12) of the code be and the same is hereby repealed, and the following enacted in lieu thereof: [28 G. A., ch. 91, § 1.]

**SEC. 2600-b. Board of examiners—how appointed—term.** The board of dental examiners shall consist of five practicing dentists, who shall have been engaged in the continuous practice of their profession in this state for the period of five years preceding their appointment, one of whom shall be appointed annually by the governor, and hold office for the term of five years from and after the first day of August following his appointment, and until his successor is appointed. The Iowa state dental society shall, at the request of the governor, submit a list of dentists of recognized ability, from which he may select the member of the board to be appointed. All vacancies occurring in the board shall be filled in like manner, and the appointee hold office for the unexpired term of his predecessor. All members of the present board shall continue in office under this act until the expiration of their respective terms of office. [28 G. A., ch. 91, § 2.]

**SEC. 2600-c. Officers—meetings—quorum.** The board shall organize by selecting one of its members as president, and one as secretary and treasurer, and shall meet at least once each year, and at such other times as it may deem necessary, and at such place as it may select. A majority of the board shall constitute a quorum, and its meetings shall at all reasonable times be open to the public. [28 G. A., ch. 91, § 3.]

**SEC. 2600-d. Examinations—license—record books—fees.** The board shall at any regular meeting, and may at any special meeting, examine applicants for a license to practice dentistry as to their knowledge and skill in dental surgery, and shall issue to such applicants as are found to be qualified a license authorizing them to practice dentistry. The license shall be signed by each member of the board, attested by the president and secretary, and have the seal of the board affixed thereto; and shall be presumptive evidence of the right of the holder to practice dentistry in the state. The name, age, nativity, location, number of years of practice of the person to whom a license is given, the number of the license, and the date of the registration thereof shall be entered in a book kept in the office of the secretary of the board, which shall be open to the inspection of the public, under proper restrictions as to its safe keeping, and the number of the book and page containing such entries shall be noted on the face of the license. Each applicant for a license shall be a graduate of a reputable dental school, which is recognized as such by the board of dental examiners, and pay to the board a fee of twenty dollars before a license is issued. [28 G. A., ch. 91, § 4.]

**SEC. 2600-e. Testimony—rules and regulations.** The board shall have authority to take testimony in relation to all matters within its jurisdiction, and the presiding officer thereof, or of any committee appointed thereby, may issue subpoenas for, and administer oaths to, witnesses called to testify before the board or such committee; and it may make and adopt all necessary rules, regulations and by-laws not inconsistent with law necessary to enable it to perform the duties and transact the business authorized and required by this act. [28 G. A., ch. 91, § 5.]

**SEC. 2600-f. Treasurer to give bond.** The treasurer shall, on assuming the duties of his office, file with the secretary of state, a good and sufficient bond in the penal sum of one thousand dollars, conditioned for the faithful discharge of his duties; and shall keep a full and accurate account of all moneys received by him under the provisions of this act, and pay out the same upon the written order of the president countersigned by the secretary. [28 G. A., ch. 91, § 6.]

**SEC. 2600-g. Compensation.** Each member of the board shall receive the sum of five dollars for each day he is actually engaged in the duties of his office, with the actual expenses incurred by him in the discharge of such duties, and the treasurer shall receive a salary not exceeding three hundred dollars per annum for his services as secretary and treasurer, which amounts

shall be paid out of the fund received by the board under the provisions of this act, and from no other fund or source. [28 G. A., ch. 91, § 7.]

**SEC. 2600-h. Biennial report—auditing committee.** The board shall make a biennial report to the governor of its proceedings, including a full and accurate account of all moneys received and disbursed, and the president shall appoint an auditing committee consisting of three practicing dentists of the state who are not members of the board, whose duty it shall be to audit the accounts of the board annually, and make a full report thereof, which report shall accompany the biennial report made by the board to the governor. Any sum of money, remaining after the payment of the compensation and expenses of the members of the board and the salary of the secretary and treasurer, shall be by the treasurer paid into the state treasury on or before the first day of May of each year. [28 G. A., ch. 91, § 8.]

**SEC. 2600-i. License filed with clerk of district court—fee.** Every person to whom a license is issued under this act shall file the same with the clerk of the district court in the county in which he desires to practice dentistry, and the clerk of the court shall be entitled to charge a fee of twenty-five cents for filing such license; and a failure to so file such license within one year after the same was issued by the board shall work the forfeiture thereof. [28 G. A., ch. 91, § 9.]

**SEC. 2600-j. Penalty.** It shall be unlawful for any person to practice dentistry in this state without having complied with the provisions of this act, and any person who shall violate the provisions thereof shall be deemed guilty of a misdemeanor, and upon a conviction shall be punished by a fine not exceeding two hundred dollars or imprisonment in the county jail not more than forty days, or by both such fine and imprisonment. [28 G. A., ch. 91, § 10.]

**SEC. 2600-k. Who not eligible to appointment on board.** No member of a dental college faculty, or no person connected therewith, shall be eligible to an appointment upon the state board of dental examiners. [28 G. A., ch. 91, § 11.]

**SEC. 2600-l. Provisions as to physicians, dental students and registered practitioners.** Nothing herein shall be construed to prevent physicians and surgeons from extracting teeth in the practice of their profession, or to prevent bona fide students of dentistry, in the regular course of their instruction, from operating upon patients at clinics, or under the supervision and in the presence of their preceptors, but no fee or salary for such operations shall be received, either directly, or indirectly, by any such student of dentistry. And nothing herein shall be construed to prohibit the practice of dentistry in this state by any practitioner who has been duly registered in accordance with the laws of Iowa existing prior to the passage of this act; or any person who is a member of an incorporated society or community and practicing dentistry solely for and among the members of such community or incorporated society without charge or compensation. [28 G. A., ch. 91, § 12.]

## CHAPTER 20.

### OF THE SOLDIERS' HOME.

[By section 8, chapter 118 of the acts of the 27th G. A., (section 2727-a8 herein) the board of control is given full power to manage, control and govern this institution with others, and by section 9 of the same act (section 2727-a9 herein) the board of trustees is abolished.—Ed.]

**SECTION 2604. Commandant—inferior officers.** The board of trustees shall appoint a commandant to serve during the pleasure of the board, and who shall be one who has an honorable discharge from the United

States army or navy, and whose salary shall not exceed eighteen hundred dollars per year, and use and occupancy of the commandant's house with lights, fuel and water, which shall include all allowances. The commandant may appoint, subject to the approval of the board, the adjutant, quartermaster and surgeon, together with such assistant surgeons as may, from time to time, be required, and the said adjutant and quartermaster shall be of like qualifications, as to service in the army or navy, with himself, and also a matron and other necessary subordinate employes, and they shall be subject to removal by him for misconduct or incompetency, but in the case of every removal a detailed statement of the cause shall be reported at once to the board of trustees and subject to its approval. The board shall fix the compensation to be paid the subordinate officers and employes of the home, not to exceed that paid for like services in similar institutions. Provided, that the adjutant, quartermaster and surgeon shall also be furnished without charge the houses erected by the state and now occupied by such officers, together with lights and water. [21 G. A., ch. 58, § 16.] [29 G. A., ch. 111, § 1.] [29 G. A., ch. 112, § 1.]

**SEC. 2606-a. Restriction as to pension money.** The board of control shall not adopt or enforce any rule in the Iowa soldiers' home which will deprive any member of the home of any part of the pension money which such member receives from the United States government, except as provided for in this act. [28 G. A., ch. 92, § 1.]

**SEC. 2606-b. Penalty for intoxication.** Any member of the home, who shall, while a member of the home, be convicted twice by any court of justice, of violating the criminal statutes of the state, or who shall twice be found guilty by the commandant, or a court martial, if the member so elect, of intoxication or other misdemeanors, shall be required to deposit the money received from the United States government as a pension, with the commandant, immediately on the receipt of his pension check. In cases where such pensioner has a wife, child, or parent dependent upon him for support, at least one-half of such pension money shall be sent to such dependent person, and if there be two or more dependent relatives the pensioner may determine to whom one-half of the pension received by him shall be sent. The other half of such pension money, as well as all money received from such pensioners as have no dependent relatives, shall be kept on deposit by the commandant for such pensioner, subject to the direction of the board of control, and the money so deposited may be paid out with the consent of the depositor, subject to the approval of the commandant under such rules as the board of control may provide. In case any depositor is discharged from the said home, any balance of such deposit in the hands of the commandant, after his ticket has been purchased, shall be paid to such pensioner thirty (30) days after his discharge, and in the case of the death of such depositor the money shall be paid to his heirs, legatees, or legal representatives. No assignment of the money deposited with the commandant, or any claim therefor shall be valid. [28 G. A., ch. 92, § 2.] [29 G. A., ch. 169, § 1.]

**SEC. 2606-c. Repeal—pension money—when deposited.** Section three (3) of said chapter is hereby repealed, and the following is enacted in lieu thereof:

Section 3. Each member of the home who receives a pension, and who has a wife or minor children, shall deposit with the commandant forthwith on receipt of his pension check one-half of the amount thereof, which shall be sent at once to the wife if she be dependent upon her own labor or others for support, or, if there be no wife, to the guardian of the minor child or children if dependent upon others for support. Provided, however, that the commandant if satisfied that the wife has deserted her husband, or is of bad character, or is not dependent upon others for support, may pay the money

deposited as aforesaid to the guardian of the dependent minor child or children. [29 G. A., ch. 169, § 2.]

**SEC. 2606-d. Acts in conflict repealed.** All acts and parts of acts, in conflict with the provisions of this act, are hereby repealed. [28 G. A., ch. 92, § 4.]

**SEC. 2608. Annual appropriation—support.** For the general support of said home, there is hereby appropriated the sum of fourteen dollars per month for each member, and ten dollars per month for each officer and employe not a member of the home, or so much thereof as may be necessary, to be estimated by the average number present for the preceding quarter. These appropriations to be drawn monthly on the requisition of the board of trustees of the home in the usual manner, and then only in such amounts as the wants of the home may require. [23 G. A., ch. 58; 22 G. A., ch. 121.] [27 G. A., ch. 72, § 1.] [29 G. A., ch. 113, § 1.]

[The above section was amended by section one of chapter 72 of the acts of the 27th G. A., by striking out the first three and a portion of the fourth line of the original section, and then by inserting after the word *member* in the seventh line thereof the word "present". There is no word *member* in the seventh line, but there is the word *number* after which the word *present* has been inserted.—Ed.]

## TITLE XIII.

### OF EDUCATION.

#### CHAPTER 1.

##### OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION.

**SECTION 2622. Duties—teachers' conventions and institutes.** He shall be charged with the general supervision of all the county superintendents and the common schools of the state; may meet county superintendents in convention at such points in the state as may be most suitable for the purpose, at which proper steps may be taken looking toward securing a more uniform and efficient administration of the school laws. He shall appoint, upon the request of county superintendents, the time and place for holding teacher's institutes, such institutes to be called when it is probable that not less than twenty teachers will be present, and remain in session not less than six working days, of which time and place of meeting he shall give notice to the county superintendent of the proper county. He shall attend teachers' institutes thus called in the several counties of the state, so far as consistent with his official duties, and assist in their management and instruction. He shall have power to collect, publish and distribute statistical and other information relative to public schools and education in general; to visit teachers' association meetings and make tours of inspection among the common schools and other institutions of learning in the state, and may deliver addresses upon subjects relative to education; to prepare, publish, and distribute blank forms for all returns he may deem necessary, or that may be required by law, of teachers, or school officers; to publish and distribute annually leaflets and circulars relative to arbor day, memorial day, and other days considered by him worthy of special observance in public schools; to prepare questions for the use of county superintendents in the examination of applicants for teachers' certificates; and to prepare, publish, and distribute, among teachers and school officers, courses of study for use in the rural and high schools of the state. When any county superintendent fails to make any report as required of him by law the superintendent of public instruction may appoint some suitable person to perform such duties and fix reasonable compensation therefor, which shall be paid by the delinquent county superintendent. [C. '73, §§ 1577, 1584; C. '51, § 1080.] [28 G. A., ch. 94, § 1.]

**SEC. 2627. Salary and expenses.** The salary of the superintendent of public instruction shall be twenty-two hundred dollars per annum, and that of his deputy fifteen hundred dollars, to be paid monthly upon the warrant of the state auditor, and, in addition thereto, the state superintendent shall receive three hundred dollars annually, or so much thereof as may be necessary, to pay actual traveling expenses incurred in the performance of official duties, to be allowed upon an itemized and verified account filed with the state auditor, who shall draw his warrant upon the state treasurer for the amount allowed. [22 G. A., ch. 109, § 1; 21 G. A., ch. 118, § 5; C. '73, § 3760.] [28 G. A., ch. 94, § 2.]

## CHAPTER 2.

## OF THE BOARD OF EDUCATIONAL EXAMINERS.

**SECTION 2629. Meetings—examinations.** The board shall meet for the transaction of business at such times and places as the president may direct, and shall annually hold at least two public examinations of teachers, at which one member or the secretary of the board shall preside, assisted by not more than two qualified teachers to be selected by it. All examinations shall be conducted in accordance with rules and regulations adopted by the board, not inconsistent with the laws of the state, and a record shall be kept of all of its proceedings. It may issue state certificates and state diplomas to such teachers as are found upon examination to possess a good moral character, thorough scholarship and knowledge of didactics, with successful experience in teaching, or with such other training and qualifications as the board may require. The examination for certificates and diplomas shall cover orthography, reading, writing, arithmetic, geography, English grammar, bookkeeping, physiology, history of the United States, algebra, botany, natural philosophy, drawing, civil government, constitution and laws of the state, and didactics; those for diplomas, in addition to the foregoing, geometry, trigonometry, chemistry, zoölogy, geology, astronomy, political economy, rhetoric, English literature, general history, and such other studies as the board may require. [19 G. A., ch. 167, §§ 2-4.] [28 G. A., ch. 95, § 1.] [29 G. A., ch. 114, § 1.]

**SEC. 2630-a. Repeal.** Section twenty-six hundred and thirty (2630) of the code is hereby repealed, and the following enacted in lieu thereof. [28 G. A., ch. 96, § 1.]

**SEC. 2630-b. Special certificates.** The educational board of examiners may issue a special certificate to any teacher of music, drawing, penmanship, or other special branches, or to any primary teacher, of sufficient experience, who shall pass such examination as the board may require in the branches, and methods pertaining thereto, for which the certificate is sought. Such certificates shall be designated by the name of the branch and shall not be valid for any other department or branch. The board shall keep a complete register of all persons to whom certificates or diplomas are issued. [28 G. A., ch. 96, § 2.]

**SEC. 2634-a. Repeal—compensation—secretary—salary.** That section twenty-six hundred and thirty-four of the code be, and the same is hereby repealed, and the following enacted in lieu thereof:

Each member of the board, and person appointed to assist in conducting examinations, shall receive for the time actually employed in such service his actual necessary expenses, and those not salaried officers shall be paid in addition three dollars a day. The board shall have power to employ a secretary and prescribe his duties. He shall receive a salary of not exceeding \$75 a month and actual necessary expenses while engaged in the performance of his duties at places other than his residence. All expenditures authorized by this section shall be certified by the superintendent of public instruction to the auditor of state, who shall draw warrants therefor upon the treasurer, but not to exceed the fees paid into the treasury by the board. The aggregate amount to be paid in any one year by the board for all purposes shall not exceed \$1,500. [27 G. A., ch. 73, § 1.]

## OF SCHOOLS FOR THE INSTRUCTION AND TRAINING OF TEACHERS.

**SEC. 2634-b. Educational examiners to inspect and supervise.** That the state board of educational examiners shall constitute a board for the inspection, recognition and supervision of the schools designed for the instruction and training of teachers for the common schools. [29 G. A., ch. 115, § 1.]

**SEC. 2634-c. Accredited schools—annual visitations.** That schools desiring state recognition shall apply to the board of educational examiners which shall then proceed to inspect such schools with reference to course of study, equipment and faculty. All schools that shall meet the requirements of the board of educational examiners shall be known as accredited schools. Such schools shall have an annual visitation by some member of the board of educational examiners, or some one appointed for that purpose by said board, who shall receive compensation as is provided for in section 2634 of the code. [29 G. A., ch. 115, § 2.]

**SEC. 2634-d. Certificates—fees.** Graduates of approved accredited schools who shall pass the required examination for a two years certificate shall receive from the state board of examiners a certificate for two years, which may be renewed under such rules as said board may prescribe. Applicants for a certificate shall pay a fee of \$2.00, one-half of which shall be returned in case of failure. [29 G. A., ch. 115, § 3.]

**SEC. 2634-e. Sworn statement.** At the close of each school year, the principal or superintendent of each accredited school shall file with the board of examiners a sworn statement, showing the name, age, post-office address, studies and attendance of each of the students in his school taking the prescribed teachers' course. [29 G. A., ch. 115, § 4.]

### CHAPTER 3.

#### OF THE STATE UNIVERSITY. \

**SECTION 2644. Tax for buildings.** For the purpose of providing for the erection, improvement and equipment of such necessary buildings as shall be determined upon by the board of regents of the state university, there shall be levied a special tax of one-tenth of a mill on the dollar upon the assessed valuation of the taxable property of the state for the erection of buildings for the state university; and the proceeds thereof shall be carried into the treasury to the credit of said state university, said levy to commence with the levy made by the executive council in August, 1896, and the same levy shall be made annually after said first levy for the five successive years thereafter. Any amount in excess of the sum of fifty-five thousand dollars raised by any one of such levies shall be paid into the state treasury. The money realized from such levy shall be held by the treasurer of state, and drawn as provided by law. The amount so realized by said levies shall be in lieu of all appropriations for the erection of buildings for said state university during said period of six years. The board of regents or managing board of the state university shall have authority to expend from time to time in the purchase of books for the university library not to exceed forty-one thousand and nine hundred dollars (\$41,900) in the aggregate, and warrants shall be issued therefor payable when the additional year's tax herein authorized is collected. There shall also be paid out of said additional year's tax the sum of thirteen thousand and one hundred dollars (\$13,100) expended in restoring the burned library building and repairing and replacing apparatus injured and destroyed, and in preserving the damaged books and property and warrants shall be issued therefor. [26 G. A., ch. 114.] [27 G. A., ch. 75, §§ 1, 2.]

**SEC. 2644-a. Repeal.** That chapter ninety-seven (97) of the acts of the twenty-eighth (28) general assembly of the state of Iowa, is hereby repealed. [29 G. A., ch. 171, § 1.]

**SEC. 2644-b. Levy of special tax—purposes—how drawn.** For the purpose of providing for the erection, repair and improvement of such neces-

sary buildings as shall be determined upon by the board of regents of the state university, there shall be levied annually for five years a special tax of one-fifth ( $\frac{1}{5}$ ) of a mill on the dollar upon the assessed valuation of the taxable property of the state, and the proceeds thereof shall be carried into the treasury to the credit of the said state university. Said levy shall be first made with the levy made for state purposes in the year nineteen hundred and two (1902), and the same levy shall be made annually for the four successive years thereafter. The money realized from such levy for said university shall be held by the treasurer of the state for the purposes hereinbefore provided and drawn upon requisition of the board of regents. The funds to be realized from the tax levies herein provided for shall not be anticipated by issuing warrants or other obligations of the state. [29 G. A., ch. 171, § 2.]

**SEC. 2644-c. Colonel of cadets.** That the commandant and instructor of military science and tactics in the Iowa State university, the college of agriculture and mechanic arts and the state normal school be given the rank of colonel of cadets, and the governor of the state of Iowa is hereby authorized to issue commissions therefor, upon the request of the president of such educational institutions. [29 G. A., ch. 116, § 1.]

## CHAPTER 4.

### OF STATE COLLEGE OF AGRICULTURE AND MECHANIC ARTS.

**SECTION 2646. Board of trustees.** The college shall be under the management and control of a board of trustees, of which the governor and superintendent of public instruction shall be members, by virtue of office, but neither the president nor other officer or employe of the college and farm shall be eligible to membership therein. [20 G. A., ch. 76, § 1; C. '73, § 1604; R., § 1714.] [27 G. A., ch. 76, § 1.]

**SEC. 2650. Annual meetings—fiscal year—report.** Annual meetings of the board of trustees shall be held at the college during the month of June of each year; the chairman may call special meetings, when found expedient. The fiscal college year shall begin on the first day of July, and end on the thirteenth day of June of each year. The board shall make a biennial report to the governor. [16 G. A., ch. 159, § 9; C. '73, §§ 1609-10; 27 G. A., ch. 76, § 2.]

**SEC. 2667. Loans.** It may loan said funds upon approved real estate security, subject to the following regulations:

1. Each loan shall be for a term not exceeding ten years, at a rate of interest to be fixed by said board, payable annually;

2. Each loan shall be secured by a mortgage paramount to all other liens upon improved farm lands in the state, the loan not to exceed fifty per cent. of the cash value thereof, exclusive of buildings;

3. Principal and interest shall be payable to the order of the board at the office of the state treasurer, the notes and mortgages to provide for the payment by the borrower of all expenses, attorney fees and costs incurred in collecting the same;

4. A register containing a complete abstract of each loan, and showing its actual condition, shall be kept by the secretary of said board, and be at all times open to inspection. The attorney-general, under the direction of the executive council, shall prepare the necessary blanks, forms and instructions to carry into effect the provisions of this section and to keep such loans secure and unimpaired. [25 G. A., ch. 110, § 1; 20 G. A., ch. 193, § 2; 28 G. A., ch. 98, § 1.]

**SEC. 2674-a. Repeal.** That chapter 99 of the acts of the twenty-eighth general assembly of the state of Iowa, is hereby repealed. [29 G. A., ch. 172, § 1.]

**SEC. 2674-b. Levy of special tax—purpose—how drawn.** For the purpose of providing for the erection, repair and improvement and equipment of such necessary buildings as shall be determined upon by the board of trustees of the Iowa state college of agriculture and mechanic arts, there shall be levied annually for five years a special tax of one-fifth of a mill on the dollar upon the assessed valuation of the taxable property of the state, and the proceeds thereof shall be carried into the treasury to the credit of the said college. Said levy shall be first made with the levy made for state purposes in the year nineteen hundred and two (1902) and the same levy shall be made annually for the four successive years thereafter. The money realized from such levy for said college shall be held by the treasurer of the state for the purpose hereinbefore provided and drawn upon requisition of the board of trustees. The funds to be realized from the tax levies herein provided for shall not be anticipated by issuing and discounting warrants or other obligations of the state. [29 G. A., Ch. 172, § 2.]

**SEC. 2674-c. Repeal not to affect collection and expenditure of taxes.** The repeal of said chapter 99 acts of the twenty-eighth general assembly shall in no manner affect the collection and expenditure of the taxes heretofore levied thereunder but the same shall be collected and expended as though said act remained in full force. [29 G. A., Ch. 172, § 3.]

[Section 1, chapter 116 of the acts of the 29th G. A., provides that the commandant and instructor of military science and tactics in the college of agriculture and mechanic arts, and other schools, be given the rank of colonel of cadets, and provision is made for issuing of commission by the governor on request of the president of the institution. See section 2644-c, *supra*.—Ed.]

## CHAPTER 5.

### OF THE NORMAL SCHOOL.

**SECTION 2682. Appropriation.** There is hereby appropriated the sum of twenty-eight thousand five hundred dollars annually as an endowment fund for the payment of the teachers of said normal school, and the further sum of nine thousand dollars annually as a contingent fund therefor. The amount herein appropriated shall be drawn and paid quarterly on the first days of March, June, September and December, on the requisition of the board of trustees of the school. [27 G. A., ch. 77, § 1.]

**SEC. 2682-a. Special tax—purpose—how drawn.** For the purpose of providing for the erection, repair and improvement and equipment of such necessary buildings as shall be determined upon by the board of trustees of the state normal school, there shall be levied annually for five years a special tax of one-tenth of a mill on the dollar upon the assessed valuation of the taxable property of the state, and the proceeds thereof shall be carried into the treasury to the credit of said state normal school. Said levy shall be first made with the levy made for state purposes in the year nineteen hundred and two (1902) and the same levy shall be made annually for the four successive years thereafter. The money realized from such levy for said state normal school shall be held by the treasurer of the state for the purposes hereinbefore provided and drawn upon requisition of the board of trustees of said state normal school. [29 G. A., ch. 117, § 1.]

[Section 1, chapter 116, of the acts of the 29th G. A., provides that the commandant and instructor of military science and tactics in the state normal school, and other schools, be given the rank of colonel of cadets, and provision is made for issuing of commission by the governor on request of the president of the institution. See section 2644-c, *supra*.—Ed.]

## CHAPTER 6.

## IOWA SOLDIERS' ORPHANS' HOME.

[27 G. A., ch. 78, § 1.]

[By section 8, chapter 118, of the acts of the 27th G. A., (section 2727-a8, herein) the board of control is given full power to manage, control, and govern this institution, with others, and by section 9 of the same act, (section 2727-a9, herein) the board of trustees is abolished.—Ed.]

**SECTION 2683. Trustees and officers.** The Iowa soldiers' orphans' home, located at Davenport, shall be under the management and control of three trustees, one of whom shall be a resident of Scott county. They shall at their meeting in May after the regular session of the legislature elect a president and secretary from their number, and shall elect a treasurer who shall be a resident of the county in which the home is situated, and he shall serve without compensation. The treasurer shall give a bond in a sum to be fixed by the board, with good and sufficient sureties, to be filed with and approved by the secretary of state, and conditioned for the faithful discharge of his duties and the safe keeping and proper disbursement of all money coming into his hands by virtue of his office. The secretary shall keep full and accurate minutes of the doings of the board, the meetings of which shall be held at the home. The board of trustees shall examine all applications for admission, and reject any for good and sufficient cause. It shall appoint a superintendent, who shall hold his or her office at its pleasure and subject to its direction. The superintendent, subject to the board, shall have charge of the institution and its conduct, and the board shall make biennial reports to the governor of the condition of the home, financial and otherwise. [22 G. A., ch. 74; 22 G. A., ch. 82, § 30; 16 G. A., ch. 94, §§ 4, 10; C. '73, §§ 1623-4, 1629, 1632.] [27 G. A., ch. 78, § 2.]

**SEC. 2685. Admissions.** All destitute children of soldiers residents of the state, orphans of soldiers under fifteen years of age who are destitute or unable to care for themselves shall be admitted upon applications approved by the board of trustees of the home and become wards of the state and such other destitute children of like age who have a legal settlement in the state, and whose applications for admission are approved by the board of supervisors or a judge of a court of record, shall be received into the home, but none in the latter class shall be so admitted as long as there are applicants denied in the former; all applications in the latter class to be made to a judge in the district of the applicant's residence, or the board of supervisors of the county in which the applicant is living. [21 G. A., ch. 111; 16 G. A., ch. 94, §§ 1, 2.] [27 G. A., ch. 78, § 3.]

**SEC. 2688. Regulations.** All children admitted to the home shall be subject to the rules and regulations of the same, and, subject to the approval of the trustees, may be expelled by the superintendent for disobedience and refusal to submit to proper discipline. They shall also be discharged upon arriving at the age of sixteen years, or sooner if possessed of sufficient means to provide for themselves. [16 G. A., ch. 94, § 3; C. '73, § 1634.] [27 G. A., ch. 78, § 4.]

**SEC. 2692. Counties liable.** Each county shall be liable for all sums paid by the home in support of its children, except soldiers' children, which shall be charged to the county, and collected when and as a part of the taxes due the state, and paid by it at the same time state taxes are paid. [16 G. A., ch. 94, § 6.] [27 G. A., ch. 78, § 5.]

## CHAPTER 7.

## OF THE INSTITUTION FOR FEEBLE-MINDED CHILDREN.

[By section 8, chapter 118 of the acts of the 27th G. A., (section 2727-a8, herein) the board of control is given full power to manage, control and govern this institution, with others, and by section 9 of the same act (2727-a9, herein) the board of trustees is abolished.—Ed.]

**SECTION 2695-a. Admission of certain women.** That all feeble-minded women under forty-six years of age who are residents of the state of Iowa may be admitted to the institution for feeble-minded children at Glenwood. [29 G. A., ch. 118, § 1.]

**SEC. 2695-b. What statutes apply.** The provisions of chapter seven (7) of title XIII of the code, in regard to the admission and maintenance of children in said institution, shall apply to the admission and maintenance of feeble-minded women authorized by this act. [29 G. A., ch. 118, § 2.]

**SEC. 2700. Support.** For the support of the institution, there is appropriated out of any money in the state treasury, not otherwise appropriated, the sum of twelve dollars monthly for each inmate therein supported by the state, counting the actual time such person is an inmate and so supported. Upon the presentation to the state auditor of a sworn statement of the average number of inmates supported in the institution by the state for the preceding month, he shall draw his warrant upon the state treasurer for such sum. [23 G. A., ch. 56; 19 G. A., ch. 40, § 9.] [27 G. A., ch. 79, §§ 1, 2.]

**SEC. 2700-a. Repeal—ordinary expenses.** That all of section twenty-seven hundred of the code, after the word "sum" in the eighth line, is hereby repealed. [27 G. A., ch. 79, § 2.]

## CHAPTER 8.

## OF THE INDUSTRIAL SCHOOL.

[By section 8, chapter 118, of the acts of the 27th G. A., (section 2727-a8, herein) the board of control is given full power to manage, control and govern this institution, with others, and by section 9, (2727-a9, herein) of the same act, the board of trustees is abolished.—Ed.]

**SECTION 2703-a. Repeal.** That section two thousand seven hundred two (2702) and section two thousand seven hundred three (2703) of the code be and the same are hereby repealed. [28 G. A., ch. 100, § 1.]

**SEC. 2704. Removal of officers—binding out boys and girls.** The board of control of state institutions shall have power to remove all officers appointed by it and appoint others in their stead. With the consent in writing of their parents or guardians, as the case may be, if they have any, it may bind out boys and girls committed to the school, to the end of their term or any less time, by written indenture as provided in law in cases of apprenticeship and under like conditions, and shall keep a care and watch over any boy or girl thus indentured, and if the obligation shall not be faithfully observed, may cancel the indenture and receive the party so bound into the school. [C. '73, § 1649.] [28 G. A., ch. 100, § 2.]

**SEC. 2705-a. Repeal.** That section two thousand seven hundred five (2705) of the code be and the same is hereby repealed. [28 G. A., ch. 100, § 3.]

**SEC. 2705-b. Superintendent to make written report.** The superintendent of the industrial school at Mitchellville shall, on or before the first day of January of each year, and at any other time when so requested by the board of control of state institutions, make a report to the said board in writing, touching all matters required of him by said board. [28 G. A., ch. 100, § 4.]

**SEC. 2707. Superintendent.** The superintendent, with such subordinate officers and employes as he may appoint, shall have charge and custody of the inmates of the school. He shall discipline, govern, instruct, employ, and use his best endeavors to reform the pupils in his care, so that, while preserving their health, he may promote, as far as possible, moral, religious and industrious habits, regular, thorough and progressive improvement in their studies, trade and employment. He shall have charge of all the property of the institution. [C. '73, §§ 1651-2.] [28 G. A., ch. 100, § 5.]

**SEC. 2708. Commitment.** When a boy or girl over the age of nine years and under sixteen, of sound mind, excepting married women, prostitutes, or any girl who is pregnant, shall be found guilty in any court of record of any crime excepting that of murder, the court in its discretion may, instead of entering judgment of conviction, order and direct the party to be sent to the industrial school, if a boy to the department at Eldora, if a girl, to that at Mitchellville, which order, certified by the clerk of the court and under its seal, shall be sufficient authority for his or her transfer to and confinement in said school. If such a boy or girl is convicted before any inferior court of a crime, or shall be found to be guilty of being a disorderly person, he or she may be forthwith sent by the court, accompanied with all the papers filed in his office upon the subject, in custody of an officer, to a judge of a court of record, who shall thereupon issue an order, directed to the parent or guardian of the party, or to such person as may have him or her in charge, or with whom he or she last resided, or one known to be nearly related to him or her, or if he or she be alone and friendless, then to any person the judge may appoint to act as guardian for the purposes of the case, requiring him or her to appear at a time and place stated and show cause why the party should not be committed to the industrial school, which order shall be served by an officer by delivering a copy to the party to whom it is addressed, or by leaving it with some person of full age at the residence or place of business of said party, and immediate return shall be made to the judge of the service. At the time and place mentioned in the order, or to which the hearing may be adjourned, on the appearance of the parent or guardian, or, in case of their failure to appear, then after the appointment of some suitable person as guardian for the purposes of the case, the judge shall proceed to take the voluntary examination of the boy or girl, to hear the statements of the party appearing for him or her, and such testimony in relation to the case as may be produced, and if upon such examination and hearing he shall be satisfied that the boy or girl is a fit subject for the industrial school, he may commit him or her to said school, until he or she arrives at the age of twenty-one (21) years, by warrant, which warrant shall state the place in which the party resided at the time of arrest, and his or her age, as near as can be ascertained, and shall command the officer to take and deliver without delay to the superintendent of said school or other person in charge thereof the said boy or girl, and the statement as to residence or age shall be conclusive thereof for the purposes of this chapter. With the warrant, the judge shall also transmit a statement of the nature of the complaint, and such other particulars concerning the accused as he may be able to ascertain. If the judge is of the opinion that the boy or girl is not a fit subject for the school, or if said boy or girl shall appeal from the decision of the court in which the conviction was had, he shall remand him or her to the custody of the officer who had him or her in charge, to be returned to the magistrate before whom the conviction was had, to be dealt with according to law. [16 G. A., ch. 38, §§ 2-4; C. '73, §§ 1653-8.] [28 G. A., ch. 100, §§ 6, 12.] [29 G. A., ch. 119, §§ 1, 2.]

[For annotations, see code, page 923.—Ed.]

[Chapter 80 of the acts of the 27th G. A. amending above section was repealed by the 28th G. A., chapter 100, section 11 (section 2711-a, herein).—Ed.]

**ADDITIONAL NOTE.**—[Section 1 chapter 119 of the acts of the 29th G. A., repeals section 13, chapter 100, 28th G. A., amending said section.—Ed.]

**SEC. 2708-a. Repeal.** That section twelve (12), section thirteen (13), and section fourteen (14) of chapter one hundred (100), laws of the twenty-eighth general assembly be, and the same are hereby repealed. [29 G. A., ch. 119, § 1.]

**SEC. 2709. Complaint by parent or guardian.** If any parent or guardian shall make complaint to a judge of a court of record that any boy or girl, over the age of seven years, and under the age of sixteen years, the child or ward of such parent or guardian, is habitually vagrant, disorderly or incorrigible, said judge shall issue a warrant to the sheriff or constable to cause said boy or girl to be brought before him at such time and place as he may appoint, when and where he shall examine the parties, and if in his judgment the boy or girl is a fit subject for the industrial school, he may issue an order, with the consent of said parent or guardian indorsed thereon, to [be] executed by the sheriff or a constable, committing said boy or girl to the custody of the superintendent of said school for reformation and instruction until he or she attains the age of twenty-one (21) years; but security for the payment of the expenses of said complaint, commitment and transportation to the school, and the expenses of board thereat, may, in the discretion of the judge, be required of said parent or guardian before such order is executed. [19 G. A., ch. 150; C. '73, § 1659.] [28 G. A., ch. 100, §§ 7, 11.] [29 G. A., ch. 119, §§ 1, 3.]

[Chapter 80 of the acts of the 27th G. A., amending above section, was repealed by the 28th G. A., chapter 100, section 11, (section 2711-a, herein.)—Ed.]

**ADDITIONAL NOTE.**—[Section 1, chapter 119, of the acts of the 29th G. A., (section 2708-a *supra*.) repeals section 13, chapter 100, 28th G. A., amending said section—Ed.]

**SEC. 2710. Return to county.** If any person committed to the industrial school shall prove unruly or incorrigible, or if his or her presence shall be manifestly and constantly dangerous or detrimental to the welfare of the school, the board of control of state institutions may order his or her removal to the county from which he or she came, and deliver to the jailer of such county, where proceedings shall be resumed as if no committal had been made to the industrial school. [C. '73, § 1662.] [28 G. A. ch. 100, § 8.]

**SEC. 2711. Discharge—parole.** No one shall be committed to the industrial school for a longer term than until he or she attains the age of twenty-one (21) years, and the board of control of state institutions may at any time after one year's service order the discharge or parole of any inmate as a reward for good conduct. And the board may, in exceptional cases, discharge or parole inmates without regard to the length of their service or conduct, when satisfied that the reasons therefor are urgent and sufficient. If paroled upon satisfactory evidence of reformation, the order may remain in effect or terminate under such rules and regulations as the board may prescribe. The binding out or the discharge of an inmate as reformed, or having arrived at the age of twenty-one (21) years, shall be a complete release from all penalties incurred by the conviction for the offense upon which he or she was committed to the school. [25 G. A., ch. 106; 19 G. A., ch. 150; C. '73, §§ 1660-1.] [28 G. A., ch. 100, §§ 9, 11, 14.] [29 G. A., ch. 119, §§ 1, 4.] [29 G. A., ch. 120, § 1.]

[Chapter 80 of the acts of the 27th G. A., amending above section, was repealed by the 28th G. A., chapter 100, section 11, (section 2711-a, herein). Section 1, chapter 119 of the acts of the 29th G. A., (section 2708-a *supra*) repeals section 14, chapter 100, 28th G. A., amending said section.—Ed.]

**SEC. 2711-a. Repeal.** That chapter 80 of the laws of the twenty-seventh general assembly be and the same is hereby repealed. [28 G. A., ch. 100, § 11.]

**SEC. 2713. Support.** For the support of the industrial school there is appropriated out of any money in the state treasury not otherwise appro-

riated, or so much thereof as may be necessary, ten dollars monthly for each boy, and twelve dollars monthly for each girl, actually supported in said school, counting the average number therein for each month; each monthly statement to be verified by the superintendent and presented to the state auditor, who shall draw his warrant upon the state treasurer for the same. [23 G. A., ch. 54; 19 G. A., ch. 92, § 1; 17 G. A., ch. 97, § 1; 15 G. A., ch. 21, § 1.] [27 G. A., ch. 81, § 1.] [28 G. A., ch. 100, § 10.] [28 G. A., ch. 101, § 1.] [29 G. A., ch. 159, § 1.]

## CHAPTER 8-A.

### IOWA INDUSTRIAL REFORMATORY FOR FEMALES.

**SECTION 2713-a. Name and location.** There is hereby established at Anamosa, Iowa, the Iowa industrial reformatory for females. [28 G. A., ch. 102, § 1.]

**SEC. 2713-b. Management—officers—rooms.** Said reformatory shall be under the control of the board of control of state institutions, and the immediate management of it shall be under such officers as said board may deem proper, but the chief executive officer of said institution, so selected by the board, shall appoint all subordinate officers and employes, as provided in chapter one hundred eighteen (118), acts of the twenty-seventh general assembly, and the salary or compensation to be paid any officer or employe of said reformatory shall be fixed in the manner provided in said chapter. Said reformatory may use and occupy the building now known as the female department of the penitentiary at Anamosa, except the two rooms on the lower floor at the right of the main entrance of the said female department, which may be used as store rooms by said penitentiary and reformatory, and said rooms shall be under the control of the warden of the penitentiary. [28 G. A., ch. 102, § 2.]

**SEC. 2713-c. When opened.** Said reformatory may be opened under the direction of the board of control of state institutions as soon as the female department of the penitentiary and the warden's house shall be completed. [28 G. A., ch. 102, § 3.]

**SEC. 2713-d. Instruction.** Any woman or girl committed or transferred to said institution shall be instructed in piety and morality, and in such branches of useful knowledge as are adapted to her age and capacity, and in some regular course of labor, as is best suited to her age, strength, disposition, and capacity, and as promises best to secure the reformation and future well-being of the inmate, and to that end the board of control is authorized to establish, and cause to be operated, in such institutions, schools for education and industrial training as may be deemed best. [28 G. A., ch. 102, § 4.]

**SEC. 2713-e. Commitments.** All girls who may now be committed under chapter eight (8), title thirteen (13) of the code, to the industrial school at Mitchellville, may, in the discretion of the district court or judge thereof, be committed to said industrial school or to this reformatory; provided, however, that no girl under nine years of age shall in any event be committed to said reformatory or to said industrial school under the provisions of this act or of chapter 8, title 13, of the code. [28 G. A., ch. 102, § 5.]

**SEC. 2713-f. Commitments continued.** Any woman or girl over the age of fourteen years, who may be an inmate of the industrial school for girls, whom the superintendent of such school may report to the board of control of state institutions as being unruly and incorrigible, and whose presence is dangerous and detrimental to the welfare of such school, may be, upon investigation of the charge by the board of control, and the same being sub-

stantiated, ordered transferred by said board of control to said reformatory, to be kept there, under such rules and regulations as may be provided therefor and for the length of time prescribed by chapter eight (8) of title thirteen (13) of the code. [28 G. A., ch. 102, § 6.]

**SEC. 2713-g. Discharge or parole.** The board of control shall have power to order the discharge or parole of any person who is confined under the provisions of this act in said reformatory, said discharge or parole to be a reward for good conduct and for proficiency in studies, and for excellency in work in the industrial department. If paroled, such order shall remain in effect, or terminate under such rules and regulations as may, with the approval of the board, be prescribed. [28 G. A., ch. 102, § 7.]

**SEC. 2713-h. Officers of penitentiary to serve.** The physician, chaplain, and storekeeper at the Anamosa penitentiary shall also serve in the same capacity for the Iowa industrial reformatory for females, for the compensation already provided by law. [28 G. A., ch. 102, § 8.]

**SEC. 2713-i. Board to notify judges and clerks.** At least thirty days prior to the opening of said institution for the reception of inmates, the board of control shall officially notify each judge of the district, superior, or police courts, and each clerk of the district court, of each county in this state, of the time when such institution shall be open for the reception of inmates. [28 G. A., ch. 102, § 9.]

**SEC. 2713-j. Board to name officers and fix salaries.** The board of control of state institutions shall determine what officers may be necessary at said institution, in addition to the superintendent heretofore provided for, and fix the salaries of the same, and may prescribe their duties, and they shall be appointed in the manner prescribed in chapter one hundred eighteen (118), acts of the twenty-seventh general assembly, which chapter shall apply to and govern said institution in all respects, except as herein provided. [28 G. A., ch. 102, § 10.]

**SEC. 2713-k. Heat, light, water, etc.** Heat, light, water, sewer facilities, power to operate machinery if needed, shall all be furnished to said reformatory free by the penitentiary at Anamosa. [28 G. A., ch. 102, § 11.]

**SEC. 2713-l. Per capita appropriation—estimates for supplies.** There is hereby appropriated for the support, care, maintenance, clothing, and transportation of the inmates of the said reformatory, and for the purpose of maintaining the schools therein, the sum of fifteen dollars per month per capita, or so much thereof as may be necessary for each inmate thereof; said per capita to be based upon the average number present for the preceding month, and to be available one month in advance. The chief executive officer of said institution is hereby authorized, a month in advance of said opening, to make estimate herein provided for all supplies for the operation of said institution, on the basis of fifty inmates for the first month. Thereafter, all the provisions of chapter one hundred eighteen (118) acts of the twenty-seventh general assembly, relating to estimates, vouchers, reports, and otherwise, shall apply to this institution, providing that said estimates shall be made by the warden of the penitentiary at Anamosa, Iowa, upon information furnished by the chief executive officer of said institution, and the said warden shall return to the board of control of state institutions said estimates for approval; and requisitions for supplies needed in said reformatory shall be made upon said warden by such officer of said reformatory as the board of control may designate, and said requisitions shall be honored by the said warden and the storekeeper of said penitentiary. [28 G. A., ch. 102, § 12.]

**SEC. 2713-m. Appropriation for industries.** For the purpose of establishing and operating proper industries in said institution, there is hereby appropriated the sum of one thousand dollars, or so much thereof as may be necessary, and for the purpose of furnishing said reformatory there

is hereby appropriated the sum of fifteen hundred dollars, or so much thereof as may be necessary. [28 G. A., ch. 102, § 13.]

**SEC. 2713-n. Government and discipline.** The board of control of state institutions is hereby authorized to make any provisions for the government, discipline, and control of said institution, not herein specifically provided for, and not in conflict with law. [28 G. A., ch. 102, §14.]

## CHAPTER 9.

### OF THE COLLEGE FOR THE BLIND.

[By section 8, chapter 118 of the acts of the 27th G. A., (section 2727-a8, herein) the board of control is given full power to manage, control and govern this institution, with others, and by section 9 of the same act (2727-a9, herein) the board of trustees is abolished.—Ed.]

**SECTION 2718-a. Repeal — appropriation — support.** That section twenty-seven hundred and eighteen (2718) of the code and chapter eighty-two (82) of the acts of the twenty-seventh general assembly be and they are hereby repealed, and in lieu thereof is enacted the following:

For the support of the college and to meet the ordinary and current expenses thereof, including the compensation of officers, teachers and other employes, the purchase of supplies of food, clothing, furniture and furnishings, books, maps, apparatus, and other incidental expenses, there is hereby appropriated, out of any money in the state treasury not otherwise appropriated, or so much thereof as may be needed, twenty-two dollars per month for nine months each year, for each resident pupil actually supported in the college. Said sum shall be placed to the credit of the college on the certificate of the board of control of state institutions which shall show the average number of pupils in the college for the preceding month, and shall be paid from the state treasury, as provided by chapter one hundred eighteen (118) of the acts of the twenty-seventh general assembly and acts amendatory thereof. [29 G. A., ch. 121, § 1.]

**SEC. 2718-b. Prior expenses—allowance.** All expenses of the college incurred prior to the first day of March, A. D. 1902, shall be paid from the funds heretofore authorized by section twenty-seven hundred and eighteen (2718) of the code, as amended and the monthly allowance authorized by this act shall be computed from the first day of February, A. D. 1902. [29 G. A., ch. 121, § 2.]

## CHAPTER 10.

### OF THE INDUSTRIAL HOME FOR THE BLIND.

[By section 8, chapter 118, of the acts of the 27th G. A., (2727-a8, herein) the board of control is given full power to manage, control and govern this institution, with others, and by section 9 of the same act, (2727-a9, herein) the board of trustees is abolished.—Ed.]

[Sections 2719-2722, both inclusive, are probably repealed, by implication at least, if not expressly, by section 2722-h of the following act, and the carrying into effect of said act by the board of control renders the former sections obsolete.—Ed.]

**SECTION 2722-a. Board of control to close institution—expenses of inmates.** As soon as practicable after the passage of this act, the board of control of state institutions is directed to close the industrial home for the blind at Knoxville, to cease all manufacturing thereat, and to cause to be sent to their homes in this state, all of the inmates therein, who may desire to return home, paying the actual expenses thereof, and they are also authorized to give each of said inmates a sum not exceeding twenty-five

dollars to cover their incidental expense on their journey home. [28 G. A., ch. 103, § 1.]

**SEC. 2722-b. Custodian.** Said board of control is hereby authorized to employ a proper person as a custodian, whose business it shall be to care for said buildings and all other state property on said farm. He shall live in the building, and shall be paid such sum per month as the board may deem proper for his services. [28 G. A., ch. 103, § 2.]

**SEC. 2722-c. Authority to lease the farm.** Said board is authorized to lease the farm and collect the rental thereof, or they may, if a suitable arrangement can be made, make the lessee of the farm the custodian of said buildings and property. [28 G. A., ch. 103, § 3.]

**SEC. 2722-d. Disposition of personal property.** Said board is authorized to sell such of the personal property at said institution or on said farm as they may deem proper to any person, or they may sell the same to any other institution under their control, which may need the same, or any part of it at a price to be fixed by them. Groceries and other perishable articles and other articles which cannot be disposed of at a fair price, may in the discretion of the board, be given to the industrial school at Mitchellville for use in said institution. [28 G. A., ch. 103, § 4.]

**SEC. 2722-e. Disposition of rent or sale money.** All money received by said board for rent or for sale of personal property shall be paid into the state treasury and placed to the credit of said institution. [28 G. A., ch. 103, § 5.]

**SEC. 2722-f. Appropriation.** There shall be available for the purpose of carrying out the provisions of this act the moneys collected from rent and from sales of personal property, and there is hereby further appropriated for said purpose the sum of three thousand dollars or so much thereof as may be necessary, and the board is empowered to draw in the name of the present superintendent of said industrial home a sufficient sum in advance on filing vouchers therefor, to in their judgment pay all expenses of transportation of inmates to their homes, and the incidental expenses above provided, on a certificate reciting the facts to said officers. All other sums to be drawn in the manner provided by chapter 118, acts of the twenty-seventh general assembly. [28 G. A., ch. 103, § 6.]

**SEC. 2722-g. Authority to transfer balances.** The treasurer of state is hereby authorized to transfer the following balances of special appropriations to the general funds of the state, viz: of appropriations made in chapter 86, acts of the twenty-fourth general assembly. A balance of \$82.95 of the appropriations "for additional furniture and machinery." A balance of \$118.50 "for planting orchard and small fruits." A balance of \$228.39 "for icehouse and cold storage." Also of chapter 144 of the acts of the twenty-fifth general assembly, a balance of \$60.00 of the item "for the building and grounds." [28 G. A., ch. 103, § 7.]

**SEC. 2722-h. Acts in conflict repealed.** All acts and parts of acts in conflict with this act are hereby repealed. [28 G. A., ch. 103, § 8.]

## CHAPTER 11.

### OF SCHOOL FOR THE DEAF.

[By section 8, chapter 118 of the acts of the 27th G. A., (section 2727-a8, herein) the board of control is given full power to manage, control and govern this institution, with others, and by section 9 of the same act (2727-a9, herein) the board of trustees is abolished.—Ed.]

**SECTION 2727-a. Repeal--appropriation--support.** That section twenty-seven hundred and twenty-seven (2727) of the code and chapter eighty-three (83) of the acts of the twenty-seventh general assembly be and they are hereby repealed and in lieu thereof is enacted the following:

For the support of the school and to meet the ordinary and current expenses thereof, including the compensation of officers, teachers and other employes, the purchase of supplies, of food, clothing, furniture and furnishings, books, maps, apparatus and other incidental expenses, there is hereby appropriated out of any money in the state treasury not otherwise appropriated, or so much thereof as may be needed, twenty-two dollars per month for nine months of each year, for each resident pupil actually supported in the school. Said sum shall be placed to the credit of the school on the certificate of the board of control of state institutions which shall show the average number of pupils in the school for the preceding month, and shall be paid from the state treasury, as provided by chapter one hundred eighteen (118) of the acts of the twenty-seventh general assembly and acts amendatory thereof. [29 G. A., ch. 122, § 1.]

**SEC. 2727-b. Prior expenses—monthly allowance.** All expenses of the school, incurred prior to the first day of April, A. D., 1902, shall be paid from the funds heretofore authorized by section twenty-seven hundred and twenty-seven (2727) of the code, as amended, and the monthly allowance authorized by this act, shall be computed from the first day of February, A. D., 1902. [29 G. A., ch. 122, § 2.]

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#### CHAPTER 11-A.

##### OF THE SALARIES OF THE CHIEF EXECUTIVE OF CERTAIN STATE INSTITUTIONS AND THE QUALIFICATION OF THE SUPERINTENDENT OF THE SCHOOL FOR THE DEAF.

**SECTION 2727-c. Salaries.** From and after July 1, 1898, the annual salary of the chief executive officer of the following institutions shall be: For the institution for feeble-minded children at Glenwood, twenty-four hundred dollars; for the industrial school, boys' department, at Eldora, eighteen hundred dollars; for the school for the deaf at Council Bluffs, fifteen hundred dollars; for the college for the blind at Vinton, twelve hundred dollars; for the Iowa soldiers' orphans' home at Davenport, fifteen hundred dollars; for the industrial school, girls' department, at Mitchellville, twelve hundred dollars; for the industrial home for the blind at Knoxville, six hundred dollars. The superintendent of the school for the deaf shall be proficient in the use of the sign language. [27 G. A., ch. 74, § 1.] [28 G. A., ch. 141, § 1.]

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#### CHAPTER 11-B.

##### OF THE BOARD OF CONTROL OF STATE INSTITUTIONS.

**SECTION 2727-a1. Nomination—term of office—confirmation—salaries—removal—vacancies.** The governor shall, prior to the adjournment of the twenty-seventh general assembly, nominate and, with the consent of two-thirds of the members of the senate in executive session, appoint three electors of the state, not more than two of whom shall belong to the same political party, and no two of whom shall reside at the time of their appointment in the same congressional district, as members of a board to be known as a "board of control of state institutions." Said member shall hold office, as designated by the governor, for two, four, and six years respectively. Subsequent appointments shall be made as above provided and, except to fill vacancies, shall be for a period of six years. The board shall at all times be subject to the above limitations and restrictions. No nomination shall be

considered by the senate until the same shall have been referred to a committee of five, not more than three of whom shall belong to the same political party, to be appointed by the president of the senate without the formality of a motion, which committee shall report to the senate in executive session, which report shall be made at any time when called for by the senate. The consideration of nominations, by the senate, shall not be had on the same legislative day the nominations are referred. The chairman of the board for each biennial period shall be the member whose term first expires, and each member thereof shall receive a salary of three thousand dollars (\$3,000.00) per annum. The governor may, by and with the consent of the senate, during a session of the general assembly, remove any member of the board for malfeasance or non-feasance in office, or for any cause that renders him ineligible to appointment, or incapable or unfit to discharge the duties of his office, and his removal when so made shall be final. When the general assembly is not in session the governor may suspend any member so disqualified, and shall appoint another to fill the vacancy thus created, subject, however, to the action of the senate when next in session. All vacancies on said board that may occur while the general assembly is not in session shall be filled by appointment by the governor, which appointment shall expire at the end of thirty days from the time the general assembly next convenes, and vacancies occurring during a session of the general assembly shall be filled as regular appointments are made and before the end of said session. [27 G. A., ch. 118, § 1.]

**SEC. 2727-a2. Oath—bond—examination—not excused from testifying.** Each member of the board shall take the oath, and qualify, as required by section one hundred and seventy-nine of the code, and shall devote his whole time to the duties of his office. Before entering on the duties of his office, each member shall give an official bond in the sum of twenty-five thousand dollars (\$25,000.00), conditioned as provided by law, signed by sureties, to be approved by the governor, and when so approved, said bonds shall be filed in the office of the secretary of state. No member of the board of control shall be eligible to any other lucrative office in the state during his term of service or for one year thereafter or to any position in any state institution during the term for which he was appointed, nor within one year after his term shall have expired. The said board of control shall be subject to the examination of the joint committee on retrenchment and reform, created by section one hundred and eighty-one of the code. The claim that any testimony or evidence sought to be elicited or produced on such examination may tend to criminate the person giving or producing it, or expose him to public ignominy, shall not excuse him from testifying or producing evidence, documentary or otherwise; but no person shall be prosecuted or subjected to penalty or forfeiture for and on account of any matter or thing concerning which he may testify or produce such evidence, provided that he shall not be exempted from prosecution and punishment for perjury committed in so testifying. [27 G. A., ch. 118, § 2.]

**SEC. 2727-a3. Offices—secretary—salary—acting secretary—supplies.** The board shall be provided by the proper authorities with suitably furnished offices at the seat of government, and shall employ a competent secretary, who shall receive a salary not to exceed two thousand dollars (\$2,000.00) per annum, and may also hire a stenographer and such other employes as may be necessary. In the absence or disability of the secretary, and the business of the board requires it, the board of control may appoint a member of the board as acting secretary during such absence or disability, who shall at such time have the powers of the secretary of the board. Said appointment shall be made of record in the proceedings of the board, and no additional compensation shall be paid because of the service of such acting secretary. The board shall, by the proper authorities, be also furnished with

all necessary books, blanks, stationery, printing, postage stamps, and such other office supplies as are furnished other state officers. It shall present to each general assembly an itemized account of its expenditures, to the end that the legislature may, for the future, fix the maximum amount of such expenditures. [27 G. A., ch. 118, § 3.] [28 G. A., ch. 143, § 4.]

**SEC. 2727-a4. Appropriation.** There is hereby appropriated from any funds in the state treasury not otherwise appropriated sufficient thereof to pay the salaries and expenditures hereby authorized. [27 G. A., ch. 118, § 4.]

**SEC. 2727-a5. Traveling expenses—governor's approval.** In addition to the salaries paid the members of the board and the secretary or other employes they shall be entitled to the necessary traveling expenses, by the nearest traveled and practicable route, incurred in going from Des Moines to the different institutions, or to other places in the state, when on official business. No expenditure for traveling expenses to other states shall be made by the board, or by any officer or agent thereof, or by any officer, employe, or agent of any state institution subject to this board, unless the authority to make such trip is granted at a meeting of the board of control upon a written resolution, adopted by the board, which shall state the purpose of such trip, and the reason the same is deemed necessary. Said resolution, if adopted, shall then be submitted to the governor for his written approval, and if he does not approve the same such trip shall not be made at the expense of the state. [27 G. A., ch. 118, § 5.]

**SEC. 2727-a6. Itemized statement.** Before any expenses of the members of the board, any officer, or agent, thereof, or before any expenses incurred by others under the direction of the board, or the expenses of any officer or employe of any institution under the charge of the board, shall be paid, a minutely itemized statement of every item of expenditure shall be presented to the proper authority, duly verified, which verification shall aver that the expense bill is just, accurate and true, and is claimed for cash expenditures, or cash disbursements, truly and actually made and paid to the parties named, as shown by said statement. Unless the statement is so verified and duly audited, payment thereof shall not be had. The expense bills of the members of the board, the secretary and its other employes, when so verified, shall be presented to the governor for his written audit, before payment is made. The salaries and such actual expenses of the board, and of the secretary and other officers, and the salaries of employes, shall be paid monthly by the treasurer of state, upon the warrant of the auditor of state. [27 G. A., ch. 118, § 6.]

**SEC. 2727-a7. Official seal.** The board shall have an official seal, and every commission, order, or other paper executed by the board may, under its direction, be attested with its seal affixed, by the secretary, or any member of the board. [27 G. A., ch. 118, § 7.]

**SEC. 2727-a8. Institutions under control.** The board of control shall have full power to manage, control, and govern, subject only to the limitations contained in this act, the soldiers' home; the state hospitals for insane; the college for the blind; the school for the deaf; the institution for the feeble-minded; the soldiers' orphans' home; the industrial home for the blind, the industrial school, in both departments; and the state penitentiaries. Within ten days after the appointment and qualification of the members of the board, it shall organize and assume the duties vested in said board, but shall not exercise full control of the institutions until July 1, 1898. [27 G. A., ch. 118, § 8.]

**SEC. 2727-a9. Powers—duties—annual statement.** The boards of trustees and commissioners now charged with the government of the institutions named in section eight hereof shall on and after July 1, 1898, have no further legal existence. All trustees now in office shall continue in office until

July 1, 1898. The powers possessed by the governor and executive council, with reference to the management and control of the state penitentiaries, shall, on July 1, 1898, cease to exist in the governor and executive council, and shall become vested in the board of control; and the said board is, on July 1, 1898, and without further process of law, authorized and directed to assume and exercise all the powers heretofore vested in or exercised by the several boards of trustees, the governor, or the executive council with reference to the several institutions of the state herein named. The duties imposed on the executive council, by statute, to establish an uniform system of books and accounts for state institutions, and to cause the same to be examined annually by a skilled accountant, and to annually require a settlement with the officers of each state institution, are transferred from said council to the board of control as to the institutions herein named. Nothing herein contained shall limit the general supervisory or examining powers vested in the governor by the laws or constitution of the state, or that are vested by him in any committee appointed by him. The board shall prepare annually for publication, in accordance with the provisions of section one hundred and sixty-three of the code, a statement of the cost for the preceding year of maintaining each of said institutions, including improvements, itemized so far as practicable, and so arranged as to show the cost of the various kinds of provisions and supplies. [27 G. A., ch. 118, § 9.]

**SEC. 2727-a10. Investigation—witnesses—contempt of court.** It shall be the duty of said board, or a committee thereof, to visit and inspect, at least once in six months, the institutions named, and investigate the financial condition and management of such institutions; and in aid of any investigation the board shall have the power to summon and compel the attendance of witnesses; to examine the same under oath, which any member thereof shall have the power to administer; and shall have access to all books, papers and property material to such investigation, and may order the production of any other books or papers material thereto. Witnesses other than those in the employ of the state shall be entitled to the same fees as in civil cases in the district court. The claim that any testimony or evidence sought to be elicited or produced on such examination may tend to criminate the person giving or producing it, or expose him to public ignominy, shall not excuse him from testifying or producing evidence, documentary or otherwise; but no person shall be prosecuted or subjected to any penalty or forfeiture for and on account of any matter or thing concerning which he may testify or produce such evidence, provided that he shall not be exempted from prosecution and punishment for perjury committed in so testifying. And it shall be the duty of the board to cause the testimony so taken to be transcribed and filed in the office of the secretary of the board at the seat of government within ten days after the same is taken, or as soon thereafter as practicable and when so filed the same shall be open for the inspection of any person. Any person failing or refusing to obey the orders of the board issued under the provisions of this section, or to give or produce evidence when required, shall be reported by the board to the district court or any judge thereof, and shall be dealt with by the court or judge as for a contempt of court. [27 G. A., ch. 118, § 10.]

**SEC. 2727-a11. Monthly visitation—may appoint a woman—visiting committee abolished.** The board, by a committee, or its secretary, shall visit each hospital for the insane once each month, and in making such visits shall be vested with and exercise the powers and functions now granted the visiting committee to such hospitals, except that the discharge of employes for cause shall be left with the superintendent as hereinafter provided. If the board deem it prudent, it may appoint a woman who resides within fifty miles of any hospital, whose duty it will be to visit such hospital, when directed by the board, and to report to the board, and who

shall be paid the same compensation from the funds of the institution visited as is now provided for members of the visiting committee, upon proper audit of the bill for such services and expenses by the board, in the manner provided for payment of current expenses of institutions. The visiting committee to the hospitals for the insane is hereby abolished, and the members are relieved from further duty upon the passage of this act. [27 G. A., ch. 118, § 11.]

**SEC. 2727-a12. Biennial report.** The board shall make reports to the governor and legislature of its observations and conclusions respecting each and every of the institutions named, including the regular biennial report to the legislature, covering the biennial period ending June 30th, preceding the regular session of the general assembly. Said biennial report shall be made not later than November 15th in the year preceding the meeting of the general assembly, and shall also contain the reports which the executive officers of the several institutions are now or may be by the board required to make, also a statement of visitations to the several institutions and when and by whom made. [27 G. A., ch. 118, § 12.]

**SEC. 2727-a13. Books and accounts.** It shall keep at its office a proper and complete system of books and accounts with each institution, which shall show every expenditure authorized and made thereat and said books shall exhibit an account of each extraordinary or special appropriation made by the legislature, with every item of expenditure thereof. [27 G. A., ch. 118, § 13.]

**SEC. 2727-a14. Uniform system of records and accounts—expert help.** It shall prescribe the form of records and the kind of accounts to be made and kept by the institutions heretofore specified. In providing for the books of accounts the said board shall establish as uniform a system as possible, compelling similar institutions to keep similar books in the financial operations of such institutions; and the board shall institute and require the keeping of a perfected system of accounts, and requisitions showing the purchase, storing and consumption of supplies for subsistence, construction or other purposes. For the purpose of establishing said system of accounts, the board is authorized to employ competent and expert help, and to inaugurate in the institutions on July 1, 1898, the most modern and complete method of accounts. The board shall, within six months after the passage of this act, determine the kinds and quality of provisions and supplies for the several institutions subject to its charge. [27 G. A., ch. 118, § 14.]

**SEC. 2727-a15. Biennial estimates of special appropriations.** It shall prepare for the use of the legislature, biennial estimates of appropriations necessary and proper to be made for the support of the said several institutions, and for the extraordinary and special expenditures for buildings, betterments, or other improvements. [27 G. A., ch. 118, § 15.]

**SEC. 2727-a16. Suggestions for legislation.** The board shall incorporate in its report to the legislature, suggestions respecting legislation for the benefit of the several institutions, or for the dependent, defective or criminal classes of the state. The board and its secretary shall on request, attend the meetings of legislative committees to which such questions may be submitted for consideration, and furnish such committees such information in regard to its doings and the conduct of such institutions as may be demanded. [27 G. A., ch. 118, § 16.]

**SEC. 2727-a17. Plans and specifications—limited to amount of appropriation—penalty.** It shall prepare plans for all betterments, improvements or buildings costing more than one thousand dollars (\$1,000) for which it may recommend an appropriation. But when an appropriation for any amount has been made, there shall be no expenditure thereof until the board has secured suitable plans and specifications prepared by a competent architect, and accompanied by a detailed statement of the amount,

quality and description of all the material and labor required for the completion of said structure; and no plan or plans shall be adopted, and no betterments, improvements or buildings constructed, that contemplate the expenditure of more money for completion than the amount appropriated by the legislature therefor, unless exempted from the provisions of this section by the act making such appropriation. In no event shall the board direct or permit an expenditure for any purpose in excess of the amount appropriated by law, or contemplated by the statute, and the members of the board, its officers and agents, are subject to the provisions of sections one hundred seventy-eight, one hundred and eighty-two, one hundred eighty-four, one hundred eighty-five, one hundred eighty-six, one hundred eighty-seven and one hundred eighty-nine of the code, to the same extent as if said named persons were particularly specified in said sections. The violation of any of the provisions of either of the sections of the code above named by any of such named officers or persons, shall be deemed a misdemeanor, and on conviction the offender shall be fined in any sum not less than two hundred dollars, nor more than five thousand dollars, in the discretion of the court, or imprisoned in the county jail not exceeding one year, or by both such fine and imprisonment. [27 G. A., ch. 118, § 17.]

**SEC. 2727-a18. Report to governor.** It shall investigate and report to the governor any abuses or wrongs alleged to exist in the state institutions referred to in this act. [27 G. A., ch. 118, § 18.]

**SEC. 2727-a19. What to inspect.** The board or any member thereof at the stated visits to any of the institutions under its control shall inspect every part of each institution, and all the places, buildings and grounds belonging thereto, or used in connection therewith. They shall make an examination of the general and special dietary, the stores, and methods of supply; as far as circumstances may permit they shall see every inmate of the soldiers' home, and the charitable institutions, especially those admitted since the preceding visit, and shall give such as may require it, suitable opportunity to converse with the members of the board apart from the officers and attendants. They shall, if deemed necessary, examine under oath the officers, attendants, guards and other employes, and make such inquiries as will determine their fitness for their respective duties. [27 G. A., ch. 118, § 19.]

**SEC. 2727-a20. Recommendations—quarterly conferences.** The board shall, during the first six months after its creation, meet in conference as often as it may determine, the superintendents, wardens and other executive officers of each of the said institutions, or as many thereof as it deems practicable, and consider in detail, all questions of management, and the methods to be adopted to secure the economical management of the several institutions, and shall send to such officers such recommendations in regard to the management and improvement of the institutions, as it may deem necessary or advisable, and the board is vested with power to enforce such recommendations and directions. After six months from the creation of the board a consultation and conference of the superintendents, wardens and chief executive officers shall be held quarterly with the board at its office in Des Moines, at a time to be designated by the board, at which meeting all matters concerning the government and management of the institutions shall be considered and discussed, and the chairman of the board of control shall preside at such meetings, and full minutes thereof shall be preserved by the secretary of such board, who shall be secretary of said meeting. [27 G. A., ch. 118, § 20.]

**SEC. 2727-a21. Districts.** The board shall divide the state into proper districts from which the several institutions may receive patients or inmates. The limit of such districts may, from time to time, as the occasion warrants, be changed or altered. And in making such districts, or the rearrangement

thereof, the superintendents, wardens, or executive heads of the institutions shall be consulted, at a time and place to be fixed by the board. When the districts are established, or a change thereof is had, the board shall notify the proper county or judicial officers, of such establishment or change. [27 G. A., ch. 118, § 21.]

**SEC. 2727-a22. Record—transfer—managing officer.** The board shall keep in its office, accessible only to the members, secretary and proper clerks, except by the consent of the board, or on the order of a judge or court of record, a record showing the residence, sex, age, nativity, occupation, civil condition and date of entrance or commitment of every person, patient, inmate, or convict in the several institutions governed by the board, the date of discharge of every such person from the institution, and whether such discharge was final, and the condition of the person at the time he left the institution. The record shall also indicate if a person is transferred from one institution to another, and to what institution; and if dead, the date and cause of death. This information shall be furnished to the board by the several institutions, and such other obtainable facts as the board may from time to time require. It is the duty of a managing officer of each institution, who shall be named by the board within ten days after the commitment or entrance of a person, patient, inmate or convict to the institution, to cause a true copy of his entrance record to be made and forwarded to the office of the board of control. When a patient or inmate leaves, or is discharged, transferred, or dies in any institution, the superintendent or person in charge shall, within ten days thereafter, send such information to the office of the board, all of which information shall be furnished on forms which the board may prescribe. [27 G. A., ch. 118, § 22.]

**SEC. 2727-a23. State architect—expenses—assistant draftsman.** The board may employ an architect who shall be skilled in the most improved method of sanitation, and competent to prepare plans, specifications, estimates and details for the buildings, betterments, and every item of equipment which may be necessary in any of the institutions, whose duty shall be to perform the work usually done by architects in preparing plans and specifications, and supervising the work of construction on all the buildings, betterments and improvements done at institutions under the control of the board. Said architect shall also perform such other labor as may be designated by the board, and shall receive a compensation to be by the board fixed, which, including expenses, shall in no event exceed three thousand dollars (\$3,000) per annum. In cases of sufficient magnitude, the board may secure the advice of a consulting architect, or secure additional skilled assistance before the adoption of the plans of the state architect, but the expense thereof shall not exceed fifteen hundred dollars in any one year. The state architect shall be entitled to receive in addition to the compensation for his services fixed by the board, his necessary traveling expenses within the state when engaged in official business, and the board may allow him compensation for assistant draftsmen for services performed for the state when, in the opinion of the board, such services are necessary, provided, however, that the total amount allowed for traveling expenses and draftsmen shall not exceed two thousand dollars in any biennial period. [27 G. A., ch. 118, § 23.] [29 G. A., ch. 160, § 1.]

**SEC. 2727-a24. Institution officers—term of office—removal—qualifications.** It shall be the duty of the board to appoint a superintendent, warden or other chief executive officer of each institution under the control of the board. The tenure of office of said officers shall be four years from the date of their appointment, and the superintendent, warden or other chief executive officer now in charge of the several institutions placed under the control of this board and who is now holding under an election or contract for a definite term shall continue in office until the expiration of such term or contract, all other superintendents, wardens, or other chief executive officer

shall hold office until January 1, 1899. This provision shall not be applicable to the present warden at the Anamosa penitentiary, and the warden-elect, W. A. Hunter, shall hold his office for the time for which he has been elected. The superintendent, warden, or other chief executive officer of any of the institutions named, may be removed by the board for misconduct, neglect of duty, incompetency, or other proper cause showing his inability or refusal to properly perform the duties of his office, but such removal shall be had only after an opportunity is given such person to be heard before such board upon preferred written charges, but the removal, when made, shall be final. The officers of the several institutions shall have the qualifications, and perform the duties now imposed and required of them by the statute, except as the same are modified or abrogated in this act. In case there is an alleged or seeming conflict between the powers of the superintendents or other executive officers and the board of control, the determination of such question by the board shall be final. [27 G. A., ch. 118, § 24.]

**SEC. 2727-a25. Power to investigate question of insanity.** The board shall have the power to investigate the question of the insanity and condition of any person committed to any state hospital, and shall discharge any person so committed or restrained, if, in its opinion, such person is not insane, or can be cared for after such discharge, without danger to others, and with benefit to the patient, but in determining whether such patient shall be discharged, the recommendation of the superintendent of such hospital shall be secured. The granting of this power to the board to serve as a commission for the determination of the insanity of a person is merely permissive, and does not repeal or alter any statute respecting the discharge or commitment of inmates to the state hospitals. [27 G. A., ch. 118, § 25.]

**SEC. 2727-a26. Power to transfer.** Patients shall be sent to the state hospital and convicts shall be sent to the penitentiary located in the district embracing the county from which they are committed. But the board may transfer the inmate in any hospital, or the convict in any penitentiary to another hospital or to the other penitentiary, at the expense of the state, and shall see that proper record thereof is made at the hospitals and penitentiaries, and in the office of the board. [27 G. A., ch. 118, § 26.]

**SEC. 2727-a27. Collection of information—bulletins—forms.** The board shall gather and present information embodying the experience of soldiers' homes, charitable, reformatory and penal institutions in this and other countries, regarding the best and most successful methods of caring for the insane, delinquent and criminal classes. And it shall encourage and urge the scientific investigation of the treatment of insanity and epilepsy by the medical staffs of the insane hospitals, and the institution for the feeble-minded, and shall publish from time to time, bulletins and reports of the scientific and clinical work now done in said institutions, or which it may require to be done therein. It shall also provide for the several institutions the forms for statistical returns to be made by them in their annual and other reports. [27 G. A., ch. 118, § 27.]

**SEC. 2727-a28. Insane patients—residence unknown.** Before the county authorities shall send to a hospital for the insane a patient whose residence is unknown, and whose maintenance is charged to the state, such authorities shall notify the board who shall immediately inquire as to the residence of such person, and the propriety of his commitment to the state hospital. If the residence of said person is found to be in another state or country, the board shall see that he is sent to his residence, or, if he is to be confined in the state hospital, the board shall direct an attendant from the hospital to convey the patient thereto. No patient to be maintained at state expense shall be received at the state hospital without the formal order of the board of control. [27 G. A., ch. 118, § 28.]

**SEC. 2727-a29. Questionable commitment.** The superintendents for the hospitals for the insane and the institution for the feeble-minded are required to immediately notify the board if there is any question as to the propriety of the commitment or detention of any person received at such institution, and said board, upon such notification, shall inquire into the matter presented, and take such action as may be deemed proper in the premises. [27 G. A., ch. 118, § 29.]

**SEC. 2727-a30. Protection against fire—means of escape.** It shall be the duty of the board to compel the superintendent, warden or other chief executive officer of each of the institutions under the control of the board, to provide at each institution, adequate and ready means of protection against fire, and to construct proper means of escape for the inmates and attendants where the same are not already constructed and to establish and enforce rigid rules and regulations, by which the danger of fire shall be minimized, and prevent, as far as possible injury to the persons of the inmates, and the loss or destruction, by any cause, of the property of the state. [27 G. A., ch. 118, § 30.]

**SEC. 2727-a31. Official bonds.** It shall be the duty of the board of control to require its secretary and each officer and employe of said board, and of every institution under its control who may be charged with the custody or control of any money or property belonging to the state, and who is not now required by statute to give bond, to give an official bond, properly conditioned, and signed by sufficient sureties, in a sum to be fixed by the board, which bond shall be approved by the board, and filed in the office of secretary of state. [27 G. A., ch. 118, § 31.]

**SEC. 2727-a32. Inventory of stock and supplies.** The board shall require within thirty days after its organization, the chief executive officer of each institution under its charge to make a complete, minute and accurate inventory of the stock and supplies on hand, the amount and value thereof, which inventory shall be under the following heads: Live stock, produce of the farm on hand, carriages and vehicles, agricultural implements, machinery, mechanical fixtures, real estate, beds and bedding in inmates' department, other furniture in inmates' department, personal property of the state in superintendent's department, ready-made clothing, dry goods, provisions and groceries, drugs and medicines, fuel, library, and all other property under such other heads as the board may deem proper. A like inventory shall be submitted by the proper officer of each institution to the board when the annual report of said officer is submitted to the board. [27 G. A., ch. 118, § 32.]

**SEC. 2727-a33. Gifts or gratuities—penalties.** No member of the board of control, or officer, agent or employe thereof, and no superintendent, officer, manager or employe of any of the institutions under the charge and control of said board, shall, directly or indirectly, for himself or any other person or for any institution under the charge of said board, receive or accept any gift or gratuity from any person or persons, firm or corporation who are dealers in goods, merchandise or supplies which may be used in any of said institutions, or from any employe, servant or agent of such person or persons, firm or corporation. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction be punished as provided in section four thousand nine hundred and four of the code, and such violation shall be cause for his removal from office. [27 G. A., ch. 118, § 33.]

**SEC. 2727-a34. Contents of biennial report—daily record.** The board shall publish in its biennial report to the legislature the name and salary of every employe of said board, the name and salary of each officer and employe in the several institutions, subject to its control. It shall be the further duty of the board to require the proper officer of each institution to keep in a book prepared for the purpose, a daily record, to be made each day,

of the time and the number of hours of service of each employe, and the monthly pay-roll shall be made from such time book, and shall be in accord therewith. When an appropriation is based on the number of inmates in or persons at an institution, the board shall require a daily record to be kept of the persons actually residing at and domiciled in such institution. [27 G. A., ch. 118, § 34.]

**SEC. 2727-a35. Political influence or contribution prohibited.** Any member, employe, or officer of the board of control, or any officer or employe of a state institution subject to this board, who by solicitation or otherwise, exerts his influence directly or indirectly, to induce other officers or employes of the state to adopt his political views or to favor any particular person or candidate for office, or who shall in any manner contribute money or other thing of value to any person for election purposes shall be removed from his office or position by the proper authorities. [27 G. A., ch. 118, § 35.] [28 G. A., ch. 143, § 2.]

**SEC. 2727-a36. Solicitation of contributions for political purposes a misdemeanor.** Any person who demands or solicits, from any member, employe, or officer of the board of control, or from any officer or employe of any institution subject to this board, a contribution of money or other thing of value, for election purposes, or for the payment of the expenses of any political committee or organization, shall be deemed guilty of a misdemeanor and punished accordingly. [28 G. A., ch. 143, § 3.]

**SEC. 2727-a37. Assistants — discharged.** The superintendent, warden, or other chief executive officer of the several institutions shall appoint all assistants, guards and employes required in the management of the institution the number of whom shall be determined by the board. It is hereby declared a misdemeanor for the members of the board, or any officer thereof, to exert any influence by solicitation or otherwise, on the managing officer of an institution in the selection of any employe or assistant. The said chief executive officer may at his pleasure discharge any person employed, but shall keep in the record of employes the date of such discharge, and shall place opposite his name the reason therefor. [27 G. A., ch. 118, § 36.]

**SEC. 2727-a38. Institution salaries.** The board shall, prior to July 1, 1898, and annually thereafter fix, with the written approval of the governor, the annual or monthly salaries of all the officers and employes in the several institutions, except such as are fixed by the general assembly. The board shall classify the officers and employes into grades, and the salaries and wages to be paid in each grade, shall be uniform in similar institutions in the state. The schedule of wages so fixed shall become operative on July 1st of each year. The salaries and wages shall be included in the monthly estimates as hereinafter provided, and paid in the same manner as other expenses of the several institutions. Officers entitled to food supplies for their families shall receive such allowance from the supplies furnished for the patients and inmates of the institution. The word "family" shall be construed to mean only the wife and minor children of an officer. [27 G. A., ch. 118, § 37.]

**SEC. 2727-a39. Local treasurer abolished.** The treasurers of the institutions placed under the management of the board of control will be relieved of their duties, and all such offices will be abolished on July 1, 1898. Such local treasurer shall account to the proper authorities for all moneys, books, records, vouchers or other evidences of property belonging to his office, and in his possession. It shall be the duty of the state treasurer to receive all moneys and evidences of indebtedness in the hands of said treasurer, and a failure on the part of any such treasurer to properly account to the state treasurer on July 1, 1898, without further process of law, shall be by the said state treasurer immediately reported to the attorney-general for such action as may be proper in the premises. [27 G. A., ch. 118, § 38.]

SEC. 2727-a40. Moneys remitted to state treasurer. All moneys belonging to the state, derived from any source at any of the institutions under the control of this board, shall be by the proper executive officer, named by the board, accounted for and remitted to the state treasurer on the first day of each month, and all funds for the necessary expenditures of such institutions shall be drawn from the state treasury, as provided in this act. [27 G. A., ch. 118, § 39.]

SEC. 2727-a41. Triplicate estimates—revision—purchase of supplies. The superintendent, warden, or other chief executive officer, as may be designated by the board of control, shall on or before the fifteenth day of each month, cause to be prepared triplicate estimates in minute detail, including estimated cost of each item, of all the expenditures required for the institution for the ensuing month. Such estimate shall also include a statement of the source and amount of all the revenues received by the said institution and accounted for to the state treasurer on the first day of each month. Two of said triplicate estimates shall be sent to the office of the board, and the third shall be kept by said superintendent, warden, or other chief executive officer. The board may revise the estimates for supplies or other expenditures, either as to quantity, quality or the estimated cost thereof, and shall certify that it has carefully examined the same, and that the articles contained in such estimate, as approved or revised by it, are actually required for the use of said institution. When the estimates have been so certified and revised, a copy of such revised estimate, duly certified, shall be sent to the institution, and another copy retained by the board. The certified copy sent to the institution shall be sufficient authority to the management of the institution to purchase the supplies enumerated in said estimate, at prices not to exceed those therein named, and not otherwise. Said supplies shall be so purchased as to permit at least thirty days' time to pay therefor, and the steward, clerk, or other officer of the institution, designated by the board, shall require itemized bills to be rendered by the persons who furnished supplies, in duplicate, for all purchases, whether made upon contract or otherwise, which shall be in the following form:

The state of Iowa, on account of the.....  
Institution (Date).

To.....Dr. (Here insert an itemized account of goods or property purchased.)

The state of..... }  
County of ..... } ss.

I, ....., on oath say that the foregoing bill of account is correct and just, and wholly unpaid; that the exact consideration therein charged for was received by the said institution; that neither the same nor any part thereof has since been commuted; and that neither bonus, commission, discount, nor any other consideration, directly or indirectly, has been given, or stipulated, within my knowledge or belief, because of the purchase thereof, as therein set forth, or for any other reason. (To be signed by the person having personal knowledge of the facts therein set forth.)

Sworn to and subscribed before me this .....day of.....

I hereby certify that the above account is correct, and that the articles therein charged have been received in good order by the..... institution.

.....  
Steward, clerk or other designated officer.



for the state, showing the payment of such indebtedness. The pay-roll of each institution can be paid by a single check sent to the steward, clerk or other officer designated by the board of control. If the treasurer of state shall require more clerical help because of this enactment, the executive council may authorize him to employ an assistant. [27 G. A., ch. 118, § 42.] [28 G. A., ch. 143, § 5.]

**SEC. 2727-a44. Contingent fund.** The board of control may permit a contingent fund, not to exceed in any institution two hundred and fifty dollars (\$250.00), to remain in the hands of the managing officer of such institution, from which expenditures may be made in case of actual emergency requiring immediate action to prevent loss or danger to the institution or to the inmates thereof. A full, minute, and itemized statement of every expenditure made during the month from such fund, shall be submitted by the proper officer of said institution to the board under such rules and regulations as may be by said board established. If necessary, the board shall make proper requisition upon the auditor of state for a warrant on the state treasurer to secure the said contingent fund for each institution. [27 G. A., ch. 118, § 43.]

**SEC. 2727-a45. Blanks and forms.** The board of control shall formulate and furnish to each institution proper blanks and forms for all statements and accounts necessary to furnish the information required of such institution. [27 G. A., ch. 118, § 44.]

**SEC. 2727-a46. Duties of institution officers.** The stewards of the hospitals for the insane, the clerks of the prisons, and the proper officer of the other institutions who shall be designated by the board, shall have charge of and be accountable for all the supplies and stores of such institution, and shall be charged therewith at their invoice value, and shall in conjunction with the chief executive officer of each institution make or direct all purchases for such institution as may be ordered by the board, under the estimates as hereinbefore provided. Such officer shall issue all the stores upon requisition approved by the superintendent or other officer designated by the board, which shall be his voucher therefor. He shall present monthly to the board of control an abstract of all expenditures, together with the accounts and pay-rolls for the preceding month, and shall examine and register all goods delivered, according to their amount and quality, and if found to correspond with the samples, and in good order, and correct in charge, he shall certify the bills as herein provided. He shall quarterly take an account of the subsistence supplies and stock in his possession and under his control, and transmit a copy of such invoice, duly verified, to the board; and at the close of the biennial period he shall make a consolidated report of all purchases, and all other transactions of his department, to the state board. If it shall appear that there is any shortage in the stores of the institution, the board shall appoint a committee from its number to investigate the cause thereof, and if it shall appear that the said shortage resulted from unavoidable loss, without the negligence of such steward, clerk or other designated officer, then such officer shall be credited therewith; otherwise, he shall be charged with the amount thereof, and shall be required to pay the same into the state treasury within sixty days after the determination of the loss. If default shall be made in said payment, he shall forfeit his office, and suit shall be instituted upon his official bond to recover the same. [27 G. A., ch. 118, § 45.]

**SEC. 2727-a47. Purchase of supplies from one institution for use of another.** Without complying with the provisions of chapter one hundred and eighteen (118) of the laws of the twenty-seventh general assembly, requiring estimates to be made, the board of control is empowered to direct the purchase of materials, or any articles of supply, for any institution subject to its management, from any other institution under its control, which purchase

shall be made at the reasonable market value of the commodity so purchased, the value thereof to be ascertained and fixed by the said board, and payments therefor shall be made as between institutions in the manner provided by law for payments for supplies. [28 G. A., ch. 143, § 1.]

**SEC. 2727-a48. Rules—additional duties.** The board of control is authorized to make its own rules for the proper execution of its powers, and may require the performance of additional duties by the officers of the several institutions, so as to fully enforce the requirements, intents and purposes of this enactment, and particularly so much thereof as relates to the making of the estimates and furnishing proper proofs of the expenditures or use of all stocks of subsistence and supplies. [27 G. A., ch. 118, § 46.]

**SEC. 2727-a49. Contracts.** Contracts may be entered into under the direction of the board of control by the proper officers of one or more of the institutions for staples and other articles of supplies, as may be found feasible by the board for the institutions to purchase in bulk for use or consumption for periods longer than thirty days. Such contracts shall not, however, be made except in conformity with the provisions of this act relating to estimates. If thought advisable, such contracts may be executed by the representative of one institution, who may be designated by the board to act for other institutions. [27 G. A., ch. 118, § 47.]

**SEC. 2727-a50. Purchase of supplies.** It shall be the duty of the board to make specific rules and regulations respecting the manner in which supplies shall be purchased and contracts made for the several institutions, so as to insure the competition and publicity necessary to secure the economical management of each institution. Jobbers, or others desirous of selling supplies to an institution, shall by filing with the chief executive officer of such institution, or with the secretary of the board, a memorandum showing their address and business, be afforded an opportunity to compete for the furnishing of the supplies under such limitations and rules as the board may prescribe. In purchasing all supplies, local dealers shall have the preference, when such can be given without loss to the state. When samples are furnished the same shall be properly marked and preserved for six months after purchase of such merchandise. [27 G. A., ch. 118, § 48.]

**SEC. 2727-a51. Letting of contracts—labor of inmates utilized.** Contracts for the erection, repairs or improvements of buildings, grounds, or properties of the institutions under charge of this board, and for which appropriations have been or may be made by the legislature, must be let for the whole or for any part of the work to be performed, by the chief executive officer of the institution, subject however, to the same rules and regulations as herein provided for the furnishing of estimates by said institution to, and the approval and revision thereof by the board of control. If the cost of the erection or betterment is not in excess of three hundred dollars (\$300) the board may permit the management of the institution to construct the same by day's labor, without contracting the work. All plans or specifications for the said erections, repairs and improvements, shall be prepared by the architect of the board, under the board's direction. The board shall determine to what extent and for what length of time, and by what means advertisements are to be inserted in newspapers for proposals for the said erections, repairs or improvements. All contracts shall be awarded by the management of the institution to the lowest responsible bidder, subject to the provisions of this act, and the approval of the board, prior to the execution of the contract. The management of the institution has the right to reject any and all bids, and to re-advertise, upon the approval of the board. A preliminary deposit of money or certified check upon a solvent bank in such amount as the board may prescribe shall be required as an evidence of good faith, upon all proposals for the construction of said buildings, repairs and improvements, which deposit or certified check shall be held by the manage-

ment of the institution under the direction of the board. The provision of this section which requires all work to be let by contract, shall not be mandatory as to the labor on the construction work at the penitentiaries, but the board shall establish such rules, and enforce the provisions of this act so that the construction work at the penitentiaries shall be performed in a manner agreeable thereto, with the strictest accountability exacted in the consumption of all supplies for construction purposes, and in the expenditure of the public moneys. On proper representations the board is authorized to so construct the erections, betterments and improvements at other institutions that the work of inmates may be utilized, if it is found to be advantageous to the state, and a substantial saving made, but the attempt to use such labor shall not permit a substantial departure from the requirements of this section; and in no case shall any expenditure be made except on estimates submitted to and approved by the board, as provided herein. No payment shall be authorized for construction purposes until satisfactory proof has been furnished to the board of control, by the proper officer or supervising architect, that the contract has been complied with by the parties; and all payments shall be made in a manner similar to that in which the current expenses of the several institutions are paid. [27 G. A., ch. 118, § 49.]

**SEC. 2727-a52. Cherokee commission abolished.** The members of the building commission authorized to construct the hospital for the insane at Cherokee shall be relieved from such duty, and the commission abolished on July 1, 1898. Before said last named day the said commission shall surrender to the board of control all plans, specifications, books, records and other properties belonging to or in the possession of the said commission, or any member thereof. The said board shall succeed to and be vested with all the powers of the said building commission, and all duties thereof will be performed by said board, and all legislation affecting the powers, duties or obligations of said building commission shall, so far as applicable, apply with equal force to the said board of control. The said board shall call upon any of the superintendents of the hospitals for the insane for such information or service as the board shall deem proper; and the said superintendents shall respond to such call for the compensation provided in the act relating to the building commission of the hospital for the insane at Cherokee. All outstanding obligations of said commission shall be executed and performed by the board of control, but this shall not prevent said board from selecting all its agents or employes in the work of construction, which shall be executed in a manner agreeable to and pursuant to the provisions of this act. [27 G. A., ch. 118, § 50.]

**SEC. 2727-a53. Educational institutions.** In addition to the powers heretofore mentioned to be exercised by the board of control, the said board shall investigate thoroughly the reports and doings of the regents of the state university, and the trustees of the state normal school, and the state college of agriculture and mechanic arts and the books and records of said institutions, for the purpose of ascertaining:

(1.) Whether the persons holding positions have faithfully accounted for all moneys of the state which have been drawn from the state treasury or have come into their hands otherwise.

(2.) If appropriations have been drawn from the state treasury in accordance with law and so expended.

(3.) Whether such persons have drawn money for services per diem, mileage or expenses, or otherwise, not authorized by law, or have authorized expenditures without authority of law. [27 G. A., ch. 118, § 51.]

**SEC. 2727-a54. Powers as to same.** The said board shall have power to visit the educational institutions, subpoena and examine witnesses and enforce attendance, and to require the production of books, records, papers and memoranda. [27 G. A., ch. 118, § 52.]

**SEC. 2727-a55. Investigation of management.** It shall be the duty of said board to investigate the manner in which all contracts for the educational institutions have been let, and to ascertain whether or not the matters in charge of such officials are conducted in an economical and business-like manner; and to report the result of such investigation to the governor with the other reports to be filed with that officer. [27 G. A., ch. 118, § 53.]

**SEC. 2727-a56. Estimates of cost, etc.** And when any one of the three last above named educational institutions shall ask appropriations for any buildings or betterments, said institution or institutions shall first have prepared by the architect provided for in this act estimates of the cost, plans and specifications of said buildings or betterments, and submit the same to the following general assembly. [27 G. A., ch. 118, § 54.]

**SEC. 2727-a57. Repeal.** Existing laws relating to the institutions referred to in this act, which are not inconsistent with the provisions of this act, shall remain in force, and all acts or parts of acts in conflict with, or inconsistent with this act, are hereby repealed. [27 G. A., ch. 118, § 55.]

**SEC. 2727-a58. Board of control supervision—insane—county and private institutions.** All county and private institutions wherein insane persons are kept are hereby placed under the supervision of the board of control of state institutions. [28 G. A., ch. 144, § 1.]

**SEC. 2727-a59. Visitation, when and by whom—reports.** It shall be the duty of said board of control as soon as practicable after the passage of this act, and at least twice annually thereafter, by one or more of its members or by some competent and disinterested person, whom the board shall appoint, to visit every private and county institution wherein insane persons are kept. Said visitor shall carefully examine into the capacity of said institutions for the care of insane patients, the number kept therein, and their sex, the arrangement of buildings and the method of their construction, their adaptation for the purposes intended, their condition as to sewerage, ventilation, light, heat, cleanliness, means of water supply, fire escapes and fire protection, the care of patients, their food, clothing, medical attendance, and treatment, their employment, if any, the number, kind, and sex of employes, their duties and salaries, including nurses, attendants, and night watches, the cost to the state or county maintaining patients, which shall in all cases be kept separate and distinct from the cost of keeping paupers, and such other information which the said board shall deem proper. Said visitors shall make a written report including all of said matters to said board. [28 G. A., ch. 144, § 2.]

**SEC. 2727-a60. Patients to have a hearing.** The person making the visit above provided for shall see all patients in the institutions and shall give each an opportunity to converse with him out of the hearing of any officer or employe of the institution, and shall fully investigate and inquire into any complaint by making inquiry from the persons in charge of said institution, and others, and report the result thereof in writing to said board; but said board, before acting on said report adversely to the institution, shall give the persons in charge thereof a copy of such report and an opportunity to be heard thereon. [28 G. A., ch. 144, § 3.]

**SEC. 2727-a61. Compensation of inspector.** In case the inspection herein provided for shall be made by a person appointed by the board of control of state institutions, such person shall be allowed such a sum as the board may in its discretion deem proper, not to exceed five dollars (\$5.00) per day for the time actually employed in said work and in going to and from the same. The actual expenses of the person making the visit, and his per diem, if any, shall be allowed and paid when itemized, sworn to, and approved, as provided for in chapter one hundred and eighteen (118) of the acts of the twenty-seventh general assembly in relation to the expenses of the board. [28 G. ch. A., 144, § 4.]

**SEC. 2727-a62. Board to make rules and regulations.** As soon as all private and county institutions in which insane persons may be kept shall have been visited and reports thereon received, the board of control shall adopt reasonable rules and regulations touching the care and treatment of, and make orders in relation to, such insane patients as may be kept in said institutions, which rules and regulations shall not interfere with the medical treatment given to private patients by competent physicians. Copies of such rules and regulations, when adopted, shall be mailed to the chief executive officer of each private institution, and to the clerk of the district court, the chairman of the board of supervisors, and the officer in charge of the institution in all counties having county institutions caring for insane persons. The board shall allow in this case a reasonable time for the management of these institutions to comply with such rules and regulations. [28 G. A., ch. 144, § 5.]

**SEC. 2727-a63. Failure to comply with board's rules—penalty.** If any such institution shall fail, neglect, or refuse within the time fixed by the board to comply substantially in all respects with said rules, regulations, and orders, said board is authorized to remove all said insane persons kept therein at public expense, to the proper state hospital, or to some private or county institution or hospital for the care of the insane that has complied with the rules and regulations prescribed by said board of control, at the expense of the county which sent said patient to said institution. Such removal of patients, if to a state hospital, to be made by an attendant or attendants sent from the state hospital, and the cost of such removal including all expenses of said attendant, shall be certified, by the superintendent of the hospital receiving the patient, to the auditor of state, whereupon he shall draw his warrant upon the treasurer of state for said sum, which shall be credited to the support fund of said hospital and charged against the general revenues of the state and collected by the auditor of state from said county. And the board of control shall notify the guardian, or one or more of the relatives of patients kept therein at private expense, that the rules as to their care are being disregarded, and of the action taken by the board as to the other patients. And should the board of control believe any person in any such institution sane, or illegally restrained of liberty, it shall institute and prosecute proceedings in the name of the state of Iowa, before the proper officer, board, or court, for the discharge of such person. If a female is removed under the provisions of this section, at least one attendant shall be a female. [28 G. A., ch. 144, § 6.]

**SEC. 2727-a64. Removal of patients from county asylum.** Whenever it shall be found by said board of control that any patient cared for at public expense is confined in any private asylum or county institution, who is violent and whose case is acute and said board shall be of the opinion, after taking competent medical testimony, that said patient can be better cared for in the state hospital with better hopes of recovery, it may remove said patient to the proper state hospital, at the expense of the proper county, said expense to be recovered as provided for in section six (6) hereof. And whenever said board shall find any patient in a state hospital, who shall have become chronic, or likely to do as well in a county or private institution as in the state hospital, it may order the county to which the keeping of said patient is chargeable to remove him or her to some county or private institution in the state which shall have complied with the rules of said board relative to the keeping of insane patients; but in no case shall a patient in a state hospital be thus transferred except upon the written consent of his or her immediate relatives, if any, or the commissioners of insanity of the county to which the patient is chargeable, and of the board of control; nor in the absence of the consent of said board shall a patient in a state hospital, who is not cured, be discharged. [28 G. A., ch. 144, § 7.]

**SEC. 2727-a65. Insane of other counties—may keep when.** The commissioners of insanity, with the consent of the board of supervisors of any county, having insane persons within such county, and having no proper facilities, either at a public or private institution, for the care, keeping and treatment of such persons within the county, may, with the consent of the board of control, provide for their care at the expense of said county at any convenient private or county institution having proper facilities for the care of the same, and which will care for them to the satisfaction of the said board of control, and which will comply with the rules and regulations that may be prescribed by the board of control, relative to the care and keeping of insane persons. [28 G. A., ch. 144, § 8.]

**SEC. 2727-a66. Authority of private asylums to keep insane.** No person shall be confined and restrained in any private institution or hospital for the care or treatment of the insane, except upon the certificate of a board of commissioners of insanity of some county in the state, or of two reputable physicians, at least one of whom shall be a *bona fide* resident of the state of Iowa, who shall certify that such person is a fit subject for treatment and restraint in said institution or hospital, which certificate shall be the authority of the owners and officers of said hospital or institution for receiving and confining said patient or person therein. [28 G. A., ch. 144, § 9.]

**SEC. 2727-a67. Appropriation.** To provide for the expenses of the inspection herein required and the per diem, there is hereby appropriated the sum of three thousand dollars (\$3,000.00), or so much thereof as may be necessary, from any funds of the state treasury not otherwise appropriated. [28 G. A., ch. 144, § 10.]

**SEC. 2727-a68. Differences of opinion—how adjudicated.** When a difference of opinion exists between the board of control and the authorities in charge of any private or county asylum in regard to the removal of a patient or patients as herein provided, the matter shall be submitted to the district court, or judge thereof, of the proper county and shall be summarily tried as an equitable action, and the judgment of the district court or judge shall be final. [28 G. A., ch. 144, § 11.]

## CHAPTER 12.

### OF COUNTY HIGH SCHOOLS.

**SECTION 2728. How established.** Any county may establish a high school in the following manner: When the board of supervisors shall be presented with a petition signed by one-third of the electors of the county as shown by the returns of the last preceding election, requesting the establishment of a county high school at a place in the county named therein, it shall submit the question together with the amount of tax to be levied to erect the necessary buildings, at the next general election to be held in the county, or at a special one called for that purpose, first giving twenty days' notice thereof in one or more newspapers published in the county, if any be published therein, and by posting such notice, written or printed, in each township of the county, at which election the vote shall be by ballot, for or against establishing the high school, and for or against the levying of the tax, the vote to be canvassed in the same manner as that for county officers. Should a majority of all the votes cast upon the question be in favor of establishing such school, and the levying of such tax, the board of supervisors shall at once appoint six trustees, residents of the county, not more than two from the same township, who, with the county superintendent of common schools as president, shall constitute a board of trustees for said high school. [C. '73, §§ 1697-9, 1701.] [27 G. A., ch. 84, § 1.]

[For annotations, see code, page 928.—Ed.]

**SEC. 2730. Site—tax—approval of electors.** As soon as convenient after the organization of the board, it shall proceed to select the best site that can be obtained without expense to the county, at the place named in the petition upon which the vote was taken, for the erection of the necessary school buildings, the title to be taken in the name of the county, and shall procure plans and specifications for the erection of such buildings, and make all necessary contracts for the erection of the same, the cost of which, when completed, shall not exceed the amount of the tax so levied therefor. They shall also annually make and certify to the board of supervisors on or before the first Monday of September of each year, an estimate of the amount of funds needed for improvements, teachers' wages and contingent expenses for the ensuing year, designating the amount for each, which, in the aggregate shall not exceed in any one year, two mills on the dollar, upon the taxable property of the county. No expenditures for buildings or other improvements shall be made, or contract entered into therefor, by said board, involving an outlay of to exceed five hundred dollars in any one year, without the same first being submitted to the electors of the county in which said school be located, for their approval; the tax to be levied and collected in the same manner as other county taxes, and paid over by the county treasurer in the same manner as school funds are paid to district treasurers. [C. '73, §§ 1702-3, 1705.] [27 G. A., ch. 84, § 2.]

**SEC. 2731. Management.** Said board shall make no purchases, nor enter into any contracts in any year, in excess of the funds on hand and to be raised by the levy of that year. It shall employ, when suitable buildings have been furnished, a competent principal teacher to take charge of the school, and such assistant teachers as may be necessary, and fix the salaries to be paid them, and in the conduct of the school may employ advanced students to assist in the work. Annual reports shall be made by the secretary to the board of supervisors, which report shall give the number of students, with the sex of each, who have been in attendance during the year, the branches taught, the text-books used, number of teachers employed, salary paid to each, amount expended for library, apparatus, buildings, and all other expenses, the amount of funds on hand, debts contracted, and such other information as may be deemed important, and this report shall be printed in at least one newspaper in the county, if any is published therein, and a copy forwarded to the superintendent of public instruction. And for their services the trustees shall each receive the sum of two dollars per day for the time actually employed in the discharge of official duties, claims for services to be presented, audited, and paid out of the county treasury, in the same manner as other accounts against the county. [C. '73, §§ 1705-6, 1710, 1712.] [27 G. A., ch. 84, § 3.]

**SEC. 2732. Regulations.** The principal of any such high school, with the approval of the board of trustees, shall make such rules and regulations as is deemed proper in regard to the studies, conduct and government of the pupils; and any pupil who will not conform to and obey such rules may be suspended or expelled therefrom by the board of trustees. Said board of trustees shall make all necessary rules and regulations in regard to the age and grade of attainments necessary to entitle pupils to admission into the school, and shall, on or before the tenth day of July of each year make an apportionment between the different school corporations of the county, of the pupils that shall attend said school, and shall apportion to each of said school corporations its proportionate number, based upon the number of pupils that can be reasonably accommodated in said school, and the number of pupils of school age, actual residents of such school corporations, as shown by the county superintendent's report last filed with the county auditor, of said county; said apportionment shall be published in the official papers of such county, to be paid for, as other county printing; pupils from the said

school corporations to the number so designated in such apportionment, shall be entitled to admission into said school, tuition free, and none others, and it shall be unlawful to accredit pupils so attending to any other school corporation, than the one in which they are enumerated for school purposes. Should there be more applicants for such admission from any school corporation than its proportionate number, so determined, then the board of directors of such school corporation shall designate which of said applicants shall be entitled to so attend. If the school shall be capable of accommodating more pupils than those attending under such apportionment, others may be admitted by the board of trustees, preference at all times being given to pupils desiring such admission, who are residents of the county. The board of trustees shall fix reasonable tuition for such pupils. If such pupils are residents of the county the school corporation from which they attend shall pay their tuition out of its contingent fund. The principal of such high school shall report to the said board of trustees under oath, at the close of each term the names and number of pupils attending such school during said term, from what school corporation they attended, and the amount of tuition, if any, paid by each, the same to be included in the annual report of the secretary of the board of trustees to the board of supervisors, provided for in section twenty-seven hundred and thirty-one (2731) of the code. The tuition so paid to be turned over to the treasurer of the board of trustees to be used in paying the expense of said school under the direction of said board. [C. '73, § 1709.] [27 G. A., ch. 84, § 4.]

**SEC. 2733-a. Repeal—petitions to abolish—election.** That section twenty-seven hundred and thirty-three of the code be repealed and the following substituted:

“Whenever citizens of any county having a county high school desire to abolish the same or to dispose of any part of the buildings or property thereof, they may petition the board of supervisors at any regular session thereof in relation thereto, and sections three hundred and ninety-seven (397), three hundred and ninety-eight (398), three hundred and ninety-nine (399) and four hundred (400) of the code shall apply to and govern the whole matter, including the manner of presenting and determining the sufficiency of such petitions and remonstrances thereto, so far as applicable. If an election is ordered the same shall be held at the time of the general election or at a special election called for that purpose and the proposition shall be submitted and the election conducted in the manner provided in title six (6) of the code. If any proposition as herein provided be legally submitted and adopted, the board of supervisors is hereby empowered to carry the same into effect.” [27 G. A., ch. 84, § 5.]

## CHAPTER 13.

### OF THE COUNTY SUPERINTENDENT.

**SECTION 2734. Qualifications—deputy.** The county superintendent, who may be of either sex, shall be the holder of a two years certificate as provided for in section twenty-seven hundred and thirty-seven (2737) of the code issued by any county superintendent in the state, or a state certificate or diploma and, shall during his term be ineligible to the office of school director or member of the board of supervisors. If for any cause he is unable to attend to his official duties, he may appoint a deputy, who may act in his stead, except in visiting schools and trying appeals. [16 G. A., ch. 136, § 2; C. '73, §§ 1765, 1770; R., § 2069.] [27 G. A., ch. 85, § 1.]

[For annotations, see code, page 930.—Ed.]

**SEC. 2736. Subject.** The examination shall include competency in and ability to teach orthography, reading, writing, arithmetic, geography, gram-

mar, history of the United States, didactics and physiology and hygiene, which latter, in each division of the subject, shall include special reference to effects of alcohol, stimulants and narcotics upon the human system. Candidates for examination in special studies need be examined in such branches only; but no special teacher shall be employed to teach any study not included in the certificate. A record shall be kept of all examinations made, and the names, ages, and residence of the applicants, with the date and result thereof. [21 G. A., ch. 1, §§ 1, 3; 17 G. A., ch. 143; C. '73, §§ 1766, 1768; R., §§ 2066, 2068; C. '51, § 1148.] [27 G. A., ch. 86, § 1.]

**SEC. 2737. Certificate—revocation.** If the examination is satisfactory, and the applicant is of good moral character, of which fact the superintendent shall require proof unless he has a personal knowledge thereof, and is in all other respects possessed of the necessary qualifications as an instructor, a certificate to that effect shall issue for a term not to exceed one year. But to applicants passing an examination in the following additional branches: Elementary civics, elementary algebra, elements of physics, and elementary economics, a certificate shall issue for a term of two years, upon proof of thirty-six weeks' successful experience in teaching. A certificate must be revoked at any time, for any cause which would have justified a refusal to grant the same, after an investigation of the facts, of which the teacher shall have personal notice and an opportunity to be present and make defense. The superintendent shall revoke the certificate of any teacher who shall fail or neglect to comply with the provisions of law relating to the teaching of physiology and hygiene, and such teacher shall be disqualified for teaching in any public school for one year thereafter. [26 G. A., ch. 39; 21 G. A., ch. 1, § 3; C. '73, §§ 1767, 1771; R., §§ 2067, 2070.] [27 G. A., ch. 86, § 2.]

[For annotations, see code, page 980.—Ed.]

**SEC. 2738. Normal institute.** The county superintendent shall hold, annually, a normal institute for the instruction of teachers and those who may desire to teach, and, with the concurrence of the superintendent of public instruction, procure such assistance as may be necessary to conduct the same, at such time as the schools in the county are generally closed. To defray the expenses of said institute, he shall require the payment of a registration fee of one dollar from each person attending the normal institutes, and the payment in all cases of one dollar from every applicant for a certificate: *provided* that, if the applicant is granted a two-years' certificate, he shall pay one dollar additional. He shall monthly, and at the close of each institute, transmit to the county treasurer all moneys so received, including the state appropriation for institutes, to be designated the "institute fund," together with a report of the name of each person so contributing, and the amount. The board of supervisors may appropriate out of the general fund such additional sum as it may find necessary for the further support of such institute. All disbursements of the institute fund shall be by warrants drawn by the county auditor, who shall draw said warrants upon the written order of the county superintendent, and said written order must be accompanied by an itemized bill for services rendered or expenses incurred in connection with the institute, which bill must be signed and sworn to by the party in whose favor the order is made and must be verified by the county superintendent. All said orders and bills shall be kept on file in the auditor's office until the final settlement of the county superintendent with the board of supervisors at the close of his term of office. No warrant shall be drawn by the auditor in excess of the amount of institute fund then in the county treasury. That the county superintendent shall furnish to the county board of supervisors a certified itemized account of the receipts and disbursements of all moneys collected and paid out by him for a normal institute, which account they shall

examine, audit and publish with their proceedings next following the holding of the normal institute. The superintendent shall report to the board of supervisors the first of January annually a summary of his official financial transactions for the previous year. [17 G. A., ch. 54; 15 G. A., ch. 57; C. '73, § 1769.] [27 G. A., ch. 87, § 1.] [29 G. A., ch. 123, § 1.]

**SEC. 2742 Compensation.** He shall receive a salary of twelve hundred and fifty dollars a year, the expenses of necessary office stationery and postage, and those incurred in attendance upon meetings called by the superintendent of public instruction; claims therefor to be made by verified statements filed with the county auditor, who shall draw his warrant upon the county treasurer therefor; and the board of supervisors may allow him such further sum by way of compensation as may be just and proper. [19 G. A., ch. 161, § 1; C. '73, § 1776; R., § 2074.] [29 G. A., ch. 124, § 1.]

[For annotations, see code, page 932.—Ed.]

## CHAPTER 14.

### OF THE SYSTEM OF COMMON SCHOOLS.

#### SECTION 2743. School districts—corporate powers.

[For earlier annotations, see code, page 932.—Ed.]

While it is not essential that contracts made by the board be limited to the term of office of the individual members, yet it is evidently the legislative intention that contracts with teachers shall not be made for more than one year. *Burkhead v. Independent Sch. Dist.* 107-29.

**SEC. 2744. Names.** District townships now existing shall hereafter be called school townships, subdivisions of which shall be called sub-districts. School corporations shall be designated as follows. The school township of (naming civil township), in the county of (naming county), state of Iowa; or, the independent school district of (naming city, town, or village, and if there are two or more districts therein, including some appropriate name or number), in the county of (naming county), state of Iowa; or, the rural independent school district of (some appropriate name or number), township of (naming township), in the county of (naming county), state of Iowa. [C. '73, § 1716; R., § 2026; C. '51, § 1108.] [27 G. A., ch. 91, § 1.]

**SEC. 2745-a. Duty of boards of school directors—fence.** It shall be the duty of all boards of school directors in school districts where the schoolhouse site adjoins the cultivated or improved lands of another to build and maintain a lawful fence between said site and cultivated or improved lands. [27 G. A., ch. 88, § 1.]

**SEC. 2745-b. Rights of owner of adjoining lands.** The owner of lands adjoining any schoolhouse site shall have the right to connect the fence on his lands with the fences around any schoolhouse site, but he shall not be liable to contribute to the maintenance of the fence around said site. [27 G. A., ch. 88, § 2.]

#### SEC. 2749. Powers of electors.

[For earlier annotations, see code, page 934.—Ed.]

The electors of a district township having the power to vote a tax, may rescind such vote unless, by so doing, they interfere with vested rights; and held that where the board and its officers had failed to certify a schoolhouse tax for collection, and the persons desiring to secure the schoolhouse for which the tax was levied had no interest except the right to bring action to

compel the certification of the tax, they had no such vested interest as to authorize them to object to the rescission of the tax *Hibbs v. Board of Directors*, 110-306.

Irregularity in recording the acts of the electors will not prevent such action being recognized and taken into account in a court of equity. *Locker v. Keiler*, 110-707.

**SEC. 2750. Special meeting.** The board of directors may call a special meeting of the voters of any school corporation by giving notice in the same manner as for the annual meeting, which shall have the powers given to a regular meeting with reference to the sale of school property and the application to be made of the proceeds, and to vote a schoolhouse tax for the purchase of a site and the construction of a necessary schoolhouse, and for obtaining roads thereto. [24 G. A., ch. 21; 18 G. A., ch. 84.] [28 G. A., ch. 104, § 1.]

**SEC. 2752. Number of directors.** The board of directors of a school township shall be composed of one director from each sub-district. But when there is an even number of sub-districts another member shall be elected at large by all the voters of the school township. When the school township is not divided into sub-districts, a board of three directors shall be elected at large, on the second Monday in March, by all the voters of the school township. [15 G. A., ch. 27; C. '73, §§ 1720-1; R., §§ 2031, 2035, 2075-6; C. '51, §§ 1112, 1721.] [27 G. A., ch. 92, § 1.]

**SEC. 2754. Elections in independent districts—tie vote.** At the annual meeting in all independent districts members of the board shall be chosen by ballot. In any district including all or part of a city of the first class, or a city under special charter, the board shall consist of seven members, three of whom shall be chosen on the second Monday in March, 1898, two on the second Monday in March, 1899, and two on the second Monday in March, 1900. In all other independent city, town, or village districts, and in all rural independent districts where the board now consists of six members, the board shall consist of five members, one of whom shall be chosen on the second Monday in March, 1898, two on the second Monday in March, 1899, and two on the second Monday in March, 1900. In all independent city, town, or village districts where the board now consists of three members such board shall hereafter consist of five members, three of whom shall be elected on the second Monday in March, 1898, one for one year, one for two years, and one for three years. In all other rural independent districts the board shall consist of three members, one of whom shall be chosen on the second Monday in March, 1898, and one each year thereafter. In districts composed in whole or in part of cities or towns, a treasurer shall be chosen in like manner, whose term shall begin on the third Monday in March and continue for two years, or until his successor is elected and qualified. The term of office of the incumbent treasurer in said districts shall expire on the third Monday in March, 1898. In such districts the polls must remain open not less than five hours, and in rural independent districts and school townships not less than two hours. In each case the polls shall open at one o'clock p. m., except as provided in section twenty-seven hundred and fifty-six of this chapter. A tie vote for any elective school office shall be publicly determined by lot forthwith, under the direction of the judges. [22 G. A., ch. 51; 18 G. A., ch. 7, § 2; C. '73, §§ 1789, 1808.] [27 G. A., ch. 91, § 2.] [27 G. A., ch. 93, § 1.]

[For earlier annotations, see code, page 936.—Ed.]

A deviation from the statutory provision appears that no one was thereby deprived as to the time for keeping the polls open of the opportunity to cast his ballot. *District Tp. v. Independent Dist.*, 112-321.

**SEC. 2755. Election precincts—register of voters—notice.** Each school corporation having five thousand or more inhabitants may be divided into such number of precincts as the board of directors shall determine, in each of which a poll shall be held at a convenient place, fixed by the board of directors, for the reception of the ballots of voters residing in such precinct. A separate register of the voters of each precinct shall be prepared by the board from the register of the electors of any city included within such school

corporation, and for that purpose a copy of such register of electors shall be furnished by the clerk of the city to the board of directors. Before each annual meeting these registers shall be revised and corrected by comparison with the last register of elections of such cities, and shall have the same force and effect at school meetings held under this section, in respect to the reception of votes thereat, as the register of election has by law at general elections. The board of directors of such school corporation, on or before the last Monday preceding such election shall appoint two suitable persons to be registrars in each of the election precincts of such school corporation for the registration of voters therein, who shall have the same qualifications as registrars appointed for general elections and shall qualify in the same manner, and receive the same compensation to be paid by the school corporation. The registrars shall meet on the day of election at the voting place in the precinct in which they have been appointed and shall hold continuous session from nine o'clock in the forenoon until seven o'clock in the afternoon. Any person claiming to be a voter, and who is not already registered in the proper precinct, may appear before them in the election precinct where he claims he is entitled to vote and make and subscribe under oath a statement in the registry book, which oath and statement shall be of the same general character, as that prescribed by section one thousand and seventy-seven (1077) of the code, and shall thereupon be granted a certificate of registration. Nothing in this section shall be construed to prohibit women from voting at all elections at which they are entitled to vote. The secretary must post a notice of the meeting in a public place in each precinct at least ten days before the meeting, and by publication for two weeks preceding the same in some newspaper published in the corporation, such notice to state the time, respective voting precincts and the polling place in each precinct, and also to specify what questions authorized by law, in addition to the election of director or directors, shall be voted upon and determined by the voters of the several precincts. [18 G. A., ch. 8, §§ 1-4.] [28 G. A., ch. 105, § 1.] [29 G. A., ch. 125, §§ 1, 2.]

#### SEC. 2758. Qualification of directors—vacancies.

[For earlier annotations, see code, page 937.—Ed.]

Where a board of directors, in the absence of the election of a new director to succeed one holding office, permitted the director then in office to qualify as his own suc-

cessor, held that the director thus qualified was at least a *de facto* officer. *District Tp. v. Myles*, 109-541.

#### SEC. 2759. President—employment of counsel.

[For earlier annotations, see code, page 938.—Ed.]

The president has no authority to represent that at the time of settlement with the treasurer the funds called for by his

accounts were produced, counted and found to be correct. *Independent Sch. Dist. v. Hubbard*, 110-58.

#### SEC. 2768. Duties of treasurer—payment of warrants.

[For earlier annotations, see code, page 940.—Ed.]

Officers are presumed, in the absence of any showing to the contrary, to have properly discharged their duties, and the treasurer's book of account is rightly received in evidence in an action against

the sureties on his bond to show the true statements of his account at the time such report was rendered. *Independent Sch. Dist. v. Hubbard*, 110-58.

**SEC. 2771. Quorum of board—filling vacancies.** A majority of the board of directors of any school corporation shall constitute a quorum for the transaction of business, but a less number may adjourn from time to time. Vacancies occurring among the officers or members shall be filled by the board by ballot, and the person receiving the highest number of votes shall be declared elected, and shall qualify as if originally elected or appointed. When the board is reduced below a quorum, by resignation or oth-

erwise, the secretary of the board shall call a special election to fill the vacancies, giving notice in the same manner as for the annual meeting on the second Monday in March. [24 G. A., ch. 19; C. '73, §§ 1730, 1738; R., §§ 2037-8.] [28 G. A., ch. 106, § 1.]

[For annotations, see code, page 940.—Ed.]

**SEC. 2778. Contracts—election of teachers—employment of teachers in sub-districts.** The board shall carry into effect any instruction from the annual meeting upon matters within the control of the voters, and shall elect all teachers and make all contracts necessary or proper for exercising the powers granted and performing the duties required by law. But the board may authorize any sub-director to employ teachers for the schools in his sub-district. Contracts with teachers must be in writing, and shall state the length of time the school is to be taught, the compensation per week of five school days or month of four weeks, and such other matters as may be agreed upon, signed by the president and teacher, and filed with the secretary before the teacher commences to teach under such contract. [22 G. A., ch. 60; C. '73, §§ 1723, 1757; R., §§ 2037, 2055.] [28 G. A., ch. 107, § 1.]

[For earlier annotations, see code, page 942.—Ed.]

**Contracts in general.** A court of equity will not, at the suit of a resident taxpayer of a school district, brought against its officers, enforce repayment of money expended under an executed contract of which the school district retains the benefit, although the contract is invalid, there being no claim that the officers acted corruptly or fraudulently, or paid an unreasonable amount. *Kagy v. Independent Dist.*, 89 N. W., 972.

Where the directors sign a contract in behalf of the district, although not in pursuance of any action of the board, they are not individually liable. *Hanna v. Wright*, 89 N. W., 1108.

Where directors individually signed a contract for apparatus purporting to bind the board of directors and not indicating an assumption of personal liability, held that they were not individually liable thereon and that the school district having through the board of directors accepted and received the benefit of the apparatus was bound by the contract. *Johnson v. School Corporation*, 90 N. W., 713.

It is the vote of the directors which is binding on the district, and not the record thereof. And where no record of the action of the directors was made it may be proven by oral testimony. *German Ins. Co. v. Independent Sch. Dist.*, 80 Fed., 366.

**Contracts with teachers.** The rules and regulations of the district fixing the time for opening the schools are part of the contract. *Burkhead v. Independent Sch. Dist.*, 107-29.

Such a contract cannot be made for a longer time than one year. *Ibid.*

Where a teacher offered by way of tender of resignation to renounce his contract, but this offer was not accepted by the board of directors until after they were notified of its withdrawal, held that a discharge of the teacher, not in accordance with the provisions of Code § 2782 was not authorized. Also held that the fact that the teacher after such unauthorized discharge drew the balance of pay due him and delivered the key of the schoolhouse on demand of the board did not show an abandonment of the contract. *Curttright v. Independent Sch. Dist.*, 111-20.

**SEC. 2780. Allowance of claims—settlements—compensation of officers.**

[For earlier annotations, see code, page 945.—Ed.]

Claims against the school district must be audited and allowed by the board of directors and not by the president, and until such claim has been presented to

the board and the board has had an opportunity to act upon it, no suit can be maintained. *Pierson v. Independent Sch. Dist.*, 106-695.

**SEC. 2782. Visiting schools—regulations—discharge of teacher—expulsion of scholar.**

[For earlier annotations, see code, pages 946-7.—Ed.]

Where the validity of a teacher's contract is in question he is not limited to an appeal but may sue in the courts. *Burkhead v. Independent Sch. Dist.*, 107-29.

While a teacher who has been discharged cannot sue for breach of contract on the ground that the discharge is wrongful, without first appealing to the county

superintendent, yet, where such an appeal has been taken, and decided in the teacher's favor, the action for the wrongful discharge may be maintained, although the decision of the county superintendent was not on the merits. *Jackson v. Independent Sch. Dist.*, 110-313.

Where a teacher tendered his resignation, which was not accepted by the board until after it was withdrawn, held that the discharge of the teacher, which was not in accordance with the provisions of this section, was not authorized. *Curttright v. Independent Sch. Dist.*, 111-20.

Where the action of the board in discharging a teacher was reversed on appeal to the county superintendent on the ground

that the teacher had been given no notice, or opportunity to be heard, held that the teacher might be tried on new charges, with due notice and a time fixed for the hearing, without reinstating such teacher in charge of the school, and that such action of the directors would not be enjoined. *White v. Wohlenberg*, 113-236.

The hearing having by reason of a temporary injunction been postponed until a time when the teacher's contract had expired, held that on dissolution of the temporary injunction the hearing to be had would relate back to the time when the further action of the board had been prevented by such temporary injunction. *Ibid.*

#### SEC. 2783. Use of contingent fund—free text-books.

[For earlier annotations, see code, pages 947-8.—Ed.]

Under this section, which differs from the corresponding section of the Code of '73, the board of directors may contract an indebtedness for books, payable out of the contingent fund, although no funds are on

hand at the time from which the indebtedness may be paid. *Hanna v. Wright*, 89 N. W., 1108; *Johnson v. School Corporation*, 90 N. W., 713.

#### SEC. 2791. Attaching territory to adjoining corporation.

[For earlier annotations, see code, pages 949-950.—Ed.]

In a particular case held that what was done by the superintendent and the board of directors was sufficient to make an effectual change of the boundary attempted, notwithstanding some irregularities in the way in which it was done. *Newton v. Independent Dist.*, 109-169.

Under statutory provisions prior to the present Code, held that boundaries of independent districts might be changed under the same provisions as applied to the change of boundaries of district townships. *Ibid.*

Where it appears that the change has been made on grounds which are sufficient

to authorize such change it will be presumed, until the contrary is shown, that the proceedings were regular and the grounds sufficient. *Ibid.*

Where a property owner has acquiesced in the attempted change of boundary, and recognized it as valid, he cannot afterwards, nor can his grantee, question its validity. *Ibid.*

Where no natural obstacles exist there is nothing on which the county superintendent may base an order, and an action of his with reference to change of boundaries is without jurisdiction. *School Tp. v. Independent Dist.*, 110-30.

**SEC. 2793-a. Corporation limits changed.** When the boundary line between a school township and an independent city or town district is not also the line between civil townships, such boundary may be changed at any time by the concurrence of the boards of directors; but in no case shall a forty-acre tract of land, by the government survey, be divided; and such subdivisions shall be excluded or included as entire forties. The boundaries of the school township or the independent district may in the same manner be extended to the line between civil townships, even though by such change one of the districts shall be included within and consolidated with the other as a single district. When the corporate limits of any city or town are extended outside the existing independent district or districts, the boundaries of said independent district or districts shall be also correspondingly extended. But in no case shall the boundaries of an independent district be affected by the reduction of the corporate limits of a city or town. [27 G. A., ch. 89, § 1.]

**SEC. 2794. Formation of independent district.** Upon the written petition of any ten voters of a city, town or village of over one hundred residents to the board of the school corporation in which the portion of the town plat having the largest number of voters is situated, such board shall estab-

lish the boundaries of a proposed independent district, including therein all of the city, town or village, and also such contiguous territory as is authorized by a written petition of a majority of the resident electors of the contiguous territory proposed to be included in said district, in not smaller subdivisions than entire forties of land, in the same or any adjoining school corporations, as may best subserve the convenience of the people for school purposes, and shall give the same notices of a meeting as required in other cases, at which meeting all voters upon the territory included within the contemplated independent district shall be allowed to vote by ballot for or against such separate organization. When it is proposed to include territory outside the town, city or village, the voters residing upon such outside territory shall be entitled to vote separately upon the proposition for the formation of such new district, by presenting a petition of at least twenty-five per cent. of the voters residing upon such outside territory, and if a majority of the votes so cast is against including such outside territory, then the proposed independent district shall not be formed. [19 G. A., ch. 118, § 1; 18 G. A., ch. 139; C. '73, §§ 1800-1; R., §§ 2097, 2105.] [29 G. A., ch. 126, § 1.]

[For earlier annotations, see code, page 951.—Ed.]

A written petition of ten voters is essential before the board acquires jurisdiction to act. The territory with reference to which there is no petition cannot be included, but the proposed district need not necessarily contain all the territory for which the petition is presented. *Munn v. School Tp.*, 110-652.

The desirability or necessity for the independent district is for the determination of the electors. The board is to say whether

the village contains one hundred residents, and whether the requisite number of electors have signed the respective petitions, and having so found, no option is left, save to fix the boundaries of the proposed district and order the election. *Ibid.*

On appeal from the action of the board to the county superintendent, the latter determines the question *de novo*, and may enter such order as ought to have been entered by the board. *Ibid.*

#### SEC. 2796. Taxes certified and levied.

[For earlier annotations, see code, page 952.—Ed.]

This section relates to perfecting an organization already determined upon by

the elected officers and is directory only. *Munn v. School Tp.*, 110-652.

#### SEC. 2797. Rural independent districts.

[For earlier annotations, see code, page 952.—Ed.]

Suit against the new districts on indebtedness of the old district must be brought in equity. *Fairfield v. Rural Ind. School Dist.*, 111 Fed., 108.

If the new districts have by agreement

divided and apportioned between them the indebtedness of the old district, then an action against them may be at law. *Fairfield v. Rural Ind. School Dist.*, 111 Fed., 453.

#### SEC. 2802. Changes of boundaries—division of assets and liabilities.

[For earlier annotations, see code, pages 954-5.—Ed.]

In making the division of assets and liabilities here contemplated the arbitrators are limited to those existing between the parties at the time the division is made. *Independent Dist. v. District Tp.*, 107-73.

The holder of bonds against the original district may maintain an action in equity against the new districts created out of the original district to enforce the payment of his bonds. *Everett v. Independent Sch. Dist.*, 109 Fed., 697.

The schoolhouse and all its belongings

are the property of the original district until awarded to the newly formed independent district. Such division must be made by the board, and not by the courts. *District Tp. v. Wiggins*, 110-702.

A district which is created from another district is liable for its proportion of the indebtedness of the parent district regardless of whether such indebtedness is in excess of the constitutional limitation of indebtedness which the new district might create. *Taylor v. School Dist.*, 97 Fed., 753.

**SEC. 2803. Attending school in another corporation.**

[For earlier annotations, see code, page 955.—Ed.]

One district may become liable to another for children of the former attending school in the latter under implied contract. Therefore a settlement between the districts for tuition in such cases may be made after the attendance on which it is based has ceased. *Weldon Sch. Dist. v. Shelby Sch. Dist.*, 113-549.

**SEC. 2806. School taxes—transportation fund.** The board of each school corporation shall at its regular meeting in March, or at a special meeting called for that purpose between the time designated for such regular meeting and the third Monday in May, estimate the amount required for the contingent fund, not exceeding five dollars for each person of school age, but each school corporation may estimate not exceeding seventy-five dollars for each school thereof, and such additional sum as may be necessary not exceeding five dollars for each person of school age for transporting children to and from school; and also such additional sum as may be authorized in the chapter on uniformity of text-books; also such sum as may be required for the teachers' fund, which, including the amount received from the semi-annual apportionment, shall not exceed fifteen dollars for each person of school age therein, but each corporation may estimate not exceeding two hundred and seventy dollars, including such apportionment, for each regular school therein. No tax shall be estimated by the board after the third Monday in May in each year. School corporations containing territory in adjoining counties may vote and estimate all taxes for school purposes in mills. The board shall apportion any tax voted by the annual meeting for schoolhouse fund among the several sub-districts in such a manner as justice and equity may require, taking as the basis of such apportionment the respective amounts previously levied upon said sub-districts for the use of such fund. [15 G. A., ch. 67, § 1; C. '73, §§ 1738, 1777-8, 1780; R., §§ 2033-4, 2037-44, 2088.] [28 G. A., ch. 108, § 1.]

[For annotations, see code, pages 956-7.—Ed.]

**SEC. 2808. Apportionment.** The county auditor shall, on the first Monday in April and the fourth Monday in September of each year, apportion the school tax, together with the interest of the permanent school fund to which the county is entitled, and all other money in the hands of the county treasurer belonging in common to the schools of the county and not included in any previous apportionment, among the several corporations therein, in proportion to the number of persons of school age, as shown by the report of the county superintendent filed with him for the year immediately preceding. He shall immediately notify the county treasurer of such apportionment and of the amount due thereby to each corporation. The county treasurer shall thereupon give notice to the president of each corporation, and shall pay out such apportionment moneys in the same manner that he is authorized to pay other school moneys to the treasurers of the several school districts. [C. '73, §§ 1781-2, 1841; R., §§ 1966, 2060-1.] [27 G. A., ch. 94, § 1.]

[For annotations, see code, pages 957-8.—Ed.]

**SEC. 2812. Bonds.**

[For earlier annotations, see code, page 959 —Ed.]

Recitals in the bonds that they are not in excess of the constitutional limitation cannot be relied on by the purchaser. *Fairfield v. Rural Ind. Sch. Dist.*, 111 Fed., 453.

**SEC. 2812-a. Repeal.** That section twenty-eight hundred and twelve (2812) of the code, section one (1) of chapter ninety-five (95) of the acts of the twenty-seventh general assembly and chapter one hundred and forty-two (142) of the acts of the twenty-eighth general assembly be and the same are hereby repealed. [29 G. A., ch. 127, § 1.]

**SEC. 2812-b. Bonds.** The board of directors of any school corporation may issue the bonds of said corporation to pay any judgment against said corporation, or any indebtedness under bonds lawfully issued and redeemable by their terms, to be known as school funding bonds. The board may also issue bonds to be known as school tax funding bonds to the extent of any uncollected lawful schoolhouse tax duly authorized by the voters, to be paid out of said tax when said tax is collected. All of said bonds shall be authorized by resolution of the board. The board may also, when authorized by the voters, issue bonds to be known as school building bonds for the purpose of providing funds for the erection, completion or improvement of schoolhouses, and the purchase of sites therefor. Each of such classes of bonds shall be substantially in the form provided for county bonds, but subject to changes that will conform them to the action of the board providing therefor, shall not run more than ten years, be in denominations of not more than one thousand nor less than one hundred dollars, and bear a rate of interest not exceeding six per cent. per annum, payable semi-annually to be signed by the president and countersigned by the secretary, and shall not be disposed of for less than par value, nor issued for other purposes than in this section provided. They shall be payable, respectively, at the pleasure of such corporation at any time after the expiration of five years, but may be sooner paid if so nominated in the bonds, be registered in the office of the county auditor, numbered consecutively, and redeemable in the order of their issuance. Upon being issued they shall be delivered to the treasurer thereof, the president taking receipt therefor, and thereupon the treasurer shall stand charged on his official bond with their amount. He shall sell the bonds for not less than par value and apply the proceeds thereof in payment of outstanding indebtedness, and for no other purpose than in this act authorized, or he may exchange the new bonds for outstanding bonds without discount, the cost of engraving and printing the bonds to be paid out of the contingent fund. The treasurer shall keep a record of the name and post-office address of all persons to whom bonds are sold. The provisions relating to payment of county bonds and notice to the owner thereof shall also apply to school bonds issued under this act. [29 G. A., ch. 127, § 2.]

[For annotations, see code, page 959.—Ed.]

**SEC. 2813. Tax to pay bonds.** The board of each school corporation shall, at the same time and in the same manner as provided with reference to other taxes, fix the amount of tax necessary to be levied to pay any amount of principal or interest due or to become due during the next year on lawful bonded indebtedness which amount shall be certified to the board of supervisors as other taxes, and levied by them on the property therein as other school taxes are levied, but such tax shall not exceed five mills upon the dollar of the assessed valuation of such property for money borrowed for improvements. [18 G. A., ch. 51, § 2; 18 G. A., ch. 132, § 6; C. '73, § 1823.] [27 G. A., ch. 95, § 2.]

**SEC. 2814. School-house sites—acquisition.**

[For earlier annotations, see code, page 960.—Ed.]

Ample grounds are essential for the exercise or recreation of the children and land may be condemned for the purpose of providing such grounds in addition to grounds for a site already secured. *Independent Sch. Dist. v. Hewitt*, 105-663.

**SEC. 2815. Condemnation.**

[For earlier annotations, see code, page 960 —Ed.]

Inconvenience due to the taking of property for school purposes, and naturally resulting from such appropriation, by which the market value of the premises is unfavorably affected, should be considered in determining the damages resulting from such taking. *Haggard v. Independent Sch. Dist.*, 113-486.

Benefits will not be taken into account in determining the damage to be assessed. *Ibid.*

Notice of appeal is to be given to the county superintendent in such cases instead

of to the sheriff, as directed in Code § 1999. *Ibid.*

Judgment for the damage to property should not be rendered against the school district on appeal where the property has not been actually appropriated. *Ibid.*

#### SEC. 2818. Appeal to county superintendent.

[For earlier annotations, see code, page 961.—Ed.]

A teacher seeking to recover for the breach of his contract may sue thereon and is not limited to an appeal. *Burkhead v. Independent Sch. Dist.*, 107-29.

Where a teacher sued for a breach of contract, claiming that an attempted discharge was not in accordance with the

requirements of Code § 2782, and therefore invalid, held that he was not to be denied relief because he had not appealed from the illegal action of the board in attempting to discharge him. *Curttright v. Independent Sch. Dist.*, 111-20

#### SEC. 2820. Appeal to state superintendent—no money judgment.

[For earlier annotations, see code, page 962.—Ed.]

Where a county superintendent acts without jurisdiction, an appeal to the state superintendent cannot confer such juris-

diction, and the correctness of an order made can be contested in the courts. *School Tp. v. Independent Dist.*, 110-30.

### CHAPTER 14-A.

#### OF COMPULSORY EDUCATION.

**SECTION 2823-a. Duties of parents and guardians—penalty.** Any person having control of any child of the age of seven (7) to fourteen (14) years inclusive, in proper physical and mental condition to attend school, shall cause such child to attend some public, private, or parochial school, where the common school branches of reading, writing, spelling, arithmetic, grammar, geography, physiology, and United States history are taught, or to attend upon equivalent instruction by a competent teacher elsewhere than school, for at least twelve (12) consecutive school weeks in each school year. Provided, that this section shall not apply to any child who lives more than two (2) miles from any school by the nearest traveled road except in those districts in which the pupils are transported at public expense, or who is excused for sufficient reasons by any court of record or judge thereof. Any person who shall violate the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not less than three (\$3) dollars nor more than twenty (\$20) dollars, for each offense. [29 G. A., ch. 128, § 1.]

**SEC. 2823-b. Reports to secretary.** Upon notice from the secretary of the school corporation within which such school is conducted, it shall be the duty of each principal of each private or parochial school, once during each school year, and at any time when requested in individual cases, and within ten days from the receipt of such notice, to furnish to such secretary a certificate and report of the names, ages and attendance of the pupils in attendance at such school during the preceding year and from the time of the last preceding report to the time at which a report is required and any person having the control of any child between seven and fourteen years of age inclusive, who shall place the same under private instruction, not in a regularly conducted school, upon receiving notice from the secretary of the school corporation, shall furnish a like certificate stating the name and age of such child and the period of time during which said child has been under said private instruction; and any person having the control of such child who is physically or mentally unable to attend school, public or private, shall fur-

nish proofs by affidavit or affidavits as to the physical or mental condition of such child. All such certificates, reports and proofs shall be filed and preserved in the office of the secretary of the school corporation as a part of the records of his office. [29 G. A., ch. 128, § 2.]

**SEC. 2823-c. Certified copies.** It shall be the duty of the secretary of the school corporation to furnish to any person interested, where so requested, certified copies of all certificates contemplated by this act, on file in his office. [29 G. A., ch. 128, § 3.]

**SEC. 2823-d. Truant schools.** The board of directors of any school corporation may establish truant schools, or set apart separate rooms in any public school building, for the instruction of children who are habitually truant from instruction, as contemplated by this act. Such directors may provide for the confinement, maintenance, and instruction of such children in such schools, under such reasonable rules and regulations as they may prescribe. If any child, committed or sent to the truant school shall prove insubordinate and escape from such school during school hours, or absent himself or herself therefrom without the consent of the persons in charge thereof, then it shall be the duty of the person in charge of said school with the consent of the parent or guardian to file information before the judge of a court of record, who may, if the charge be found to be true and the said child be habitually vagrant, disorderly, or incorrigible commit such child to one of the industrial schools of the state, under the same proceeding as is provided by section twenty-seven hundred eight (2708) of the code, so far as the same may be applicable. [29 G. A., ch. 128, § 4.]

**SEC. 2823-e. Truant officers.** The board of directors of each school corporation may, at their annual meeting in each year, appoint one or more truant officers, who shall serve for one year, and who may be a constable or a member of the police force, whose duty it shall be to report violations of this act to the secretary of the school corporation, and see to the enforcement of the provisions of this act. It shall be the duty of said truant officer or officers to apprehend and take into custody without warrant any child of the age of seven (7) to fourteen (14) years inclusive, who habitually frequents or loiters about public places during school hours without lawful occupation, or cannot produce a certificate as provided in section two (2) hereof, also any truant child who absents himself or herself from school, and place him or her in charge of the teacher having charge of any school which said child is entitled to attend, and which school may be designated to said officers by the person having legal control of such child: Provided, however, in case the school so designated by the parent or person having the care and control of said child be a public school it shall be such as directed by the rules and regulations of the school board and the statutes of the state, and if other than a public school, the maintenance of said child in such school shall be without expense to the school corporation or state. Upon failure of such child to properly attend, or when, on report of the teacher having the custody of such child, said child is shown to not properly conduct itself in the school where placed as herein provided, the child may be removed therefrom by the board of directors and placed either in a public school or a truant school conducted in said district. The truant officer or officers shall be entitled to such compensation for service rendered under this act, as shall be fixed by the board of directors appointing him or them, which compensation shall be paid from the contingent fund of said district. [29 G. A., ch. 128, § 5.]

**SEC. 2823-f. Enforcement.** It shall be the duty of the director or president of any board of directors, or any truant officers appointed by such board of directors, to enforce the provisions of this act, to sue for and recover the penalties herein provided, and to institute criminal prosecution against any person violating the provisions of this act, and any such officers neglecting to do so within thirty (30) days after a written notice has been

served upon him by any citizen of said district within which the offending person shall reside, shall himself be liable for a fine of not less than ten (\$10) dollars nor more than twenty (\$20) dollars for each offense. [29 G. A., ch. 128, § 6.]

**SEC. 2823-g. Teachers and school officers—duties.** All teachers of the public schools of the state, and county superintendents, and school officers and employes shall promptly report to the secretary of the school corporation any violations of the provisions of this act, of which they have knowledge or information, and he shall promptly inform the president of the board of directors thereof and such president shall, if necessary, call a meeting of the board of directors to take such action thereon as the facts shall justify, and any child placed in any truant school may be discharged therefrom at the discretion of the board, upon sufficient assurance of the future good conduct of such child. [29 G. A., ch. 128, § 7.]

**SEC. 2823-h. Provisions for punishment.** The board of directors of every school corporation is hereby authorized to provide such reasonable methods of punishment of children who are habitually truant from school, or who habitually frequent or loiter about public places during school hours without lawful occupation, as may be necessary to carry out and make effectual the provisions of this act. [29 G. A., ch. 128, § 8.]

**SEC. 2823-i. School census.** It shall be the duty of all officers, empowered to take the school census, to ascertain the number of children of the ages of seven (7) to fourteen (14) years, inclusive, in their respective districts, the number of such children who do not attend school, and so far as possible, the cause of failure to attend school. [29 G. A., ch. 128, § 9.]

## CHAPTER 14-B.

### OF THE SALE AND DISTRIBUTION OF THE SCHOOL LAWS OF IOWA.

**SECTION 2823-j. County auditors—requisition—duplicate receipts.** On or before the fifteenth day of November of each year, the auditor of each county shall make an estimate of the number of copies of the school laws of Iowa, as will, in his judgment, be required to supply the demand for such laws in his county, in addition to the number of copies of said school laws furnished by the state as provided for in section 2624, chapter 1, title 13 of the code. The county auditor shall transmit this estimate to the superintendent of public instruction, together with a requisition for the number of copies required. On receipt of the requisition the superintendent of public instruction shall forward to the county auditor the number of copies named in the requisition. On receipt of the copies transmitted to him, the county auditor shall execute receipts therefor in duplicate, one of which he shall immediately transmit to the superintendent of public instruction and the other to the state auditor. [27 G. A., ch. 90, § 1.]

**SEC. 2823-k. Sale—price.** The county auditor shall keep for sale at his office in the court house of the county, copies of the school laws of the state of Iowa, which he shall receive in the manner hereinbefore provided, at a price not to exceed twenty (20) cents per copy of such laws, bound in paper and not to exceed [thirty] (30) cents per copy of such laws bound in cloth and pay the proceeds of such sales into the county treasury on or before the fifteenth day of November of each year. [27 G. A., ch. 90, § 2.]

**SEC. 2823-l. Statement of copies sold.** The said county auditor shall also on or before the fifteenth day of November of each year, make out in writing under oath, a statement of the number of copies sold by him and not before accounted for, and the number remaining on hand and the amount paid to the county treasurer, and transmit such statement to the auditor of

state, who shall charge the county treasurer with such amount, and the superintendent of public instruction shall certify to the state auditor the number of copies transmitted to each county auditor; and the state auditor shall charge each county auditor therewith, and subsequently credit him with such as may be sold or otherwise lawfully disposed of. [27 G. A., ch. 90, § 3.]

**SEC. 2823-m. Copies delivered to successor.** When the county auditor goes out of office, having any such copies remaining, he shall deliver them to his successor, taking his receipt therefor in duplicate, one of which shall be sent to the state auditor which shall be his sufficient discharge for the same. [27 G. A., ch. 90, § 4.]

#### CHAPTER 14-C.

##### LIBRARIES FOR THE USE OF TEACHERS, PUPILS AND OTHER RESIDENTS IN SCHOOL DISTRICTS.

**SECTION 2823-n. Library fund.** The treasurer of each school township and each rural independent district in this state shall withhold annually, from the money received from the apportionment for the several school districts, not less than five nor more than fifteen cents, as may be ordered by the board, for each person of school age residing in each school corporation, as shown by the annual report of the secretary, for the purchase of books as hereinafter provided. When so ordered by the board of directors, the provisions of this section shall apply to any independent district. [28 G. A., ch. 110, § 1.]

**SEC. 2823-o. Purchase of books—distribution.** Between the third Monday of September and the first day of December in each year the president and secretary of the board, with the assistance of the county superintendent of schools, shall expend all money withheld by the treasurer as provided in section one of this act, in the purchase of books selected from the lists prepared by the state board of educational examiners as hereinafter provided, for the use of the school district; in school townships the secretary shall distribute the books thus selected to the librarians among the several sub-districts, and at least semi-annually collect the same and distribute others. [28 G. A., ch. 110, § 2.]

**SEC. 2823-p. State board of educational examiners to prepare lists of books.** It is hereby made the duty of the state board of educational examiners to prepare annually or biennially lists of books suitable for use in school district libraries, and furnish copies of such lists to each president, secretary, and each county superintendent, as often as the same shall be published or revised, from which lists the several presidents and secretaries and county superintendents shall select and purchase books. [28 G. A., ch. 110, § 3.]

**SEC. 2823-q. Record book.** It shall be the duty of each secretary to keep in a record book, furnished by the board of directors, a complete record of the books purchased and distributed by him. [28 G. A., ch. 110, § 4.]

**SEC. 2823-r. Librarian.** Unless the board of directors shall elect some other person, the secretary in independent districts and director in sub-districts in school townships shall act as librarian and shall receive and have the care and custody of the books, and shall loan them to teachers, pupils, and other residents of the district, in accordance with the rules and regulations prescribed by the state board of educational examiners and board of directors. Each librarian shall keep a complete record of the books in a record book furnished by the board of directors. During the periods that the school is in session the library shall be placed in the schoolhouse, and

the teacher shall be responsible to the district for its proper care and protection. The board of directors shall have supervision of all books and shall make an equitable distribution thereof among the schools of the corporation. [28 G. A., ch. 110, § 5.]

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#### CHAPTER 14-D.

##### OF THE TEACHING OF THE ELEMENTS OF VOCAL MUSIC IN THE PUBLIC SCHOOLS.

**SECTION 2823-s. Instruction in vocal music authorized.** That the elements of vocal music, including when practical the singing of simple music by note, be taught in all of the public schools of Iowa, and that all teachers teaching in schools where such instruction is not given by special teachers be required to satisfy the county superintendent of their ability to teach the elements of vocal music in a proper manner. Provided, however, that no teacher shall be refused a certificate or the grade of his or her certificate lowered on account of lack of ability to sing. [28 G. A., ch. 109, § 1.]

**SEC. 2823-t. Normal institute.** That it shall be the duty of each county superintendent to have taught annually in the normal institute the elements of vocal music. [28 G. A., ch. 109, § 2.]

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#### CHAPTER 15.

##### OF THE UNIFORMITY, PURCHASE AND LOANING OF TEXT-BOOKS.

**SECTION 2831. County board of education—question as to county uniformity.** The county superintendent, the county auditor and the members of the board of supervisors shall constitute a county board of education. When petitions shall have been signed by one-third the school directors in any county, other than those in cities and towns, and filed in the office of the county superintendent of such county at least thirty days before the annual school elections, asking for a uniform series of text-books in the county, then such county superintendent shall immediately notify the other members of the county board of education in writing, and within fifteen days after the filing of the petitions said board of education shall meet and provide for submitting to the electors at the next annual meeting the question of county uniformity of school text-books. [25 G. A., ch. 24, §§ 8, 9.] [28 G. A., ch. 111, § 1.]

**SEC. 2832. Selection of books—depositories—distribution—itemized accounts.** Should a majority of the electors voting at such elections favor a uniform series of text-books for use in said county, then the county board of education shall meet and select the school text-books for the entire county, and contract for the same under such rules and regulations as the said board of education may adopt. When a list of text-books has been so selected, they shall be used by all the public schools of said county, except as hereinafter provided, and the board of education may arrange for such depositories as it may deem best, and may pay for said school books out of the county funds, and sell them to the school districts at the same price as provided for in section twenty-eight hundred and twenty-four of this chapter, and the money received from said sales shall be returned to the county funds by said board of education monthly. The boards of school officers, who are hereby made the judges of the school meetings, shall certify to the board of supervisors the full returns of the votes cast at said meetings the next day after the holding of said meetings, who shall, at their next regular meeting, proceed to canvass said votes and declare the result. Unless otherwise ordered by the

board of education, the county superintendent shall have charge of such text-books and of the distribution thereof among the depositories selected by the board; he shall render to the board at each meeting thereof itemized accounts of his doings, and shall be liable on his official bond therefor. [25 G. A., ch. 24, § 9.] [28 G. A., ch. 112, § 1.]

## CHAPTER 16.

### OF THE SCHOOL FUND.

**SECTION. 2849. Loans.** The permanent school fund shall be loaned out by the county auditor, as it comes into the hands of the county treasurer, in sums of three thousand dollars or less to one person or company, in case it is found impracticable to keep the whole amount of funds loaned in sums of five hundred dollars or less to one person or company. In the event it can be kept loaned out in sums of five hundred dollars or less to one person or company, then no loan shall exceed five hundred dollars, nor shall a loan of said fund be made to or be carried by the county auditor, treasurer or member of the board of supervisors. Each loan shall be made for at least one and not more than five years, evidenced by promissory notes bearing not less than five per cent. per annum, payable annually, and delinquent interest to draw the same rate, to be secured by a mortgage on unincumbered real estate, situated in the county in which the loan is made, and appraised, as hereinafter provided, for at least double the sum borrowed; the appraisement to be made by three persons under oath, selected by the county auditor, who shall not in making the valuation take into consideration the buildings upon the lands, for which service each shall be allowed fifty cents, to be paid by the borrower, who shall also pay for recording the mortgage. [23 G. A., ch. 23; 19 G. A., ch. 174, § 2; 18 G. A., chs. 1, 2, 6; C. '73, §§ 1861-3; R., §§ 1981-3.] [28 G. A., ch. 113, § 1.]

[For annotations, see code, page 969.—Ed.]

**SEC. 2855. Lands bid in—losses—county liable for interest.** When land has been bid in by the county under foreclosure proceedings, the county auditor shall at once notify the state auditor, who shall give the county credit for the amount of the original amount of the notes remaining unpaid. When a re-sale is made, and the state auditor through the county auditor has notice thereof, he shall charge the county with the full amount of re-sale, and if the land shall be purchased by a third party for a less amount than due, the loss shall be sustained by the county. County auditors shall on the first day of January report to the state auditor the amounts of all sales and re-sales of the sixteenth section, five hundred thousand acres grant and escheated estates made the year previous, who shall charge the same to the counties, with interest upon the same from the date of such sales or re-sales, at the rate of five per cent. per annum. He shall also on the first day of January charge up to each county having permanent school fund under its control, interest on the whole amount in said county, at the rate of four and one-half per cent., payable semi-annually on the first day of January and July of the year following, and include it in the semi-annual apportionment of interest collected for the year, which shall be taken as the whole sum due from each county. Any surplus collected over the four and one-half per cent. charged shall be paid into the county treasury. If any county fails to collect the amount of interest due the state, the deficiency shall be advanced from the county treasury. Any county delinquent in the payment of the state interest account shall be charged one per cent. per month on the amount delinquent, until paid. County auditors shall, upon the first days of January

and July, report to the auditor of state the amount of interest collected, which amount so reported shall be added to the semi-annual apportionment of interest hereinbefore provided for. [23 G. A., ch. 23, § 3; 18 G. A., ch. 12, § 3; C. '73, §§ 1881-2, 1884.] [28 G. A., ch. 113, § 2.]

## CHAPTER 17.

### OF THE STATE LIBRARY AND HISTORICAL COLLECTIONS.

[Section 2868 of the code is alluded to in the title of chapter 173 of the acts of the 29th G. A. as being repealed by said act but the section is nowhere referred to in the body of the act itself.—Ed.]

**SECTION 2869-a. Repeal.** That section 2869 of the code and chapter 148 of the acts of the twenty-seventh general assembly, be and the same are hereby repealed. [29 G. A., ch. 173, § 8.]

[Chapter 148 of the acts of the 27th G. A., was amended by chapter 145 of the acts of the 28th G. A., by adding thereto the following words: "and for such other purposes as in the judgment of the library board are for the best interests of the traveling library system as operated in the state of Iowa." In repealing said chapter 148, no mention is made of the amendment, but the amendment is meaningless without the part repealed.—Ed.]

[Sections 2871, 2872, 2873, and 2874 of the code, are alluded to in the title of chapter 173 of the acts of the 29th G. A., as being repealed by said act, but the same are nowhere mentioned in the body of the act itself.—Ed.]

**SEC. 2881. Compensation of librarian—assistants.** The state librarian shall be paid an annual salary of twelve hundred dollars, and may employ for his aid one first assistant at an annual salary of one thousand dollars, one second assistant at an annual salary of eight hundred dollars, and one third assistant at an annual salary of seven hundred dollars. [24 G. A., ch. 60; 21 G. A., ch. 158; 20 G. A., ch. 191, § 4; 17 G. A., ch. 75; C. '73, § 3762.] [28 G. A., ch. 115, § 1.]

[The salaries of the state librarian and assistant are changed by section 2881-f, *infra*, which is section 6, chapter 114 acts of the 28th G. A. This act took effect by publication March 13, 1900, while chapter 115, acts of the 28th G. A., amends section 2881, which act took effect by publication April 7, 1900. No repealing clause or section is to be found in either of said acts.—Ed.]

## CHAPTER 17-A.

### CONSOLIDATION OF THE MISCELLANEOUS PORTION OF STATE LIBRARY WITH THE HISTORICAL DEPARTMENT.

**SECTION 2861-a. Consolidation—board of trustees.** That the board of trustees of the Iowa state library and the board of trustees of the Iowa historical department be, and the same are hereby, empowered and directed to consolidate the miscellaneous portion of the Iowa state library (exclusive of the law section), or so much thereof as shall be regarded by said board as advisable, with the historical department; the aforesaid consolidation to take effect on the first day of January, nineteen hundred and one, or at any such later date as said trustees may direct; and that on and after January first, nineteen hundred and one, the board of trustees of the Iowa state library and the board of trustees of the Iowa state historical department shall cease to exist as such, and the aforesaid boards shall by this act become the board of trustees of the state library and the historical department of Iowa, and the newly constituted board shall thereafter be charged with all the duties and responsibilities imposed upon the boards aforementioned and possess all the powers thereof. [28 G. A., ch. 114, § 1.]

**SEC. 2881-b. State librarian—curator—assistant librarian—reports.** That after such consolidation the state librarian shall have general charge of the historical department and of the consolidated and law libraries. The curator of the museum and art gallery shall have charge of the museum, the art gallery, the newspapers, and historical periodicals. The assistant to librarian shall have charge of the law library, under the direction of the state librarian. The above officers shall serve out the terms for which they shall have been appointed, at the expiration of which their successors shall be appointed by the board of trustees, and shall hold their respective offices for the term of six (6) years. The state librarian shall submit to the governor biennially a report giving the history of said consolidated libraries for the preceding two years, accompanied by a like report by the curator of the museum and art gallery. [28 G. A., ch. 114, § 2.]

**SEC. 2881-c. Furniture and fixtures.** The executive council is authorized to procure the furniture and fixtures made necessary by such consolidation and pay for the same out of any money in the state treasury not otherwise appropriated. [28 G. A., ch. 114, § 3.]

**SEC. 2881-d. Assignment of rooms.** The board of trustees shall have the control of the respective departments above named, and shall assign rooms to be occupied by each of said officers. [28 G. A., ch. 114, § 4.]

**SEC. 2881-e. Appropriations.** There shall be annually appropriated, from any money in the state treasury not otherwise appropriated, the sum of ten thousand dollars for the use of the state library and historical department and museum, and the sum of two thousand five hundred dollars for the separate use of the law department, the money to be expended under the direction of the board of trustees of the state library and historical department; and the existing appropriations of five thousand dollars for the state library and six thousand dollars for the historical department shall be discontinued upon the consolidation aforesaid. [28 G. A., ch. 114, § 5.]

**SEC. 2881-f. Salaries—bonds.** From and after the taking effect of this act, the salary of the state librarian shall be the sum of two thousand (2,000) dollars per annum; the salary of the curator of the historical department shall be the sum of sixteen hundred (1,600) dollars per annum, and the salary of the assistant librarian shall be the sum of twelve hundred (1,200) dollars per annum. After the consolidation provided for in this act becomes effective, the state librarian shall give bond in the sum of five thousand dollars, and the curator of the museum and art gallery, and the first assistant librarian, each in the sum of one thousand dollars, conditioned upon the faithful performance of their respective duties, to be approved by the board of trustees. The aforesaid salaries to be paid monthly out of any money in the state treasury not otherwise appropriated. [28 G. A., ch. 114, § 6.]

## CHAPTER 18-A.

### LIBRARY COMMISSION AND FREE PUBLIC AND PUBLIC SCHOOL LIBRARIES.

**SECTION 2888-a. State library commission—term—chairman.** The governor shall appoint four persons, at least two of whom shall be women, who, with the state librarian and superintendent of public instruction and president of the state university, shall constitute a state library commission. The first members appointed by the governor shall be appointed for terms of two, three, four and five years from the first day of July, 1900, and all subsequent appointments shall be for terms of five years, except appointments to fill vacancies. The commission shall annually elect a chairman. [28 G. A., ch. 116, § 1.]

**SEC. 2888-b. Repeal.** That sections two (2), three (3), four (4) and five (5) of chapter one hundred sixteen (116) acts of the twenty-eighth

general assembly be and the same are hereby repealed, and that the following be substituted therefor. [29 G. A., ch. 173, § 1.]

**SEC. 2888-c. Duties of commission.** The commission shall give advice and counsel to all free and other public libraries, and to all communities which may propose to establish them, as to the best means of establishing and maintaining such libraries, the selection of books, cataloging, and other details of library management. It may print such lists and circulars of information as it shall deem necessary and as approved by the executive council. It may also conduct a summer school of library instruction, a clearing house for periodicals for free gift to local libraries and perform such other public service as may seem to it for the best interests of the state. [29 G. A., ch. 173, § 2.]

**SEC. 2888-d. Traveling libraries.** The state library board shall transfer to the Iowa library commission all associate and traveling libraries belonging to the state, and the said library commission is authorized to accept the same; and it shall be the duty of said commission to operate the said associate and traveling libraries, also to properly equip and circulate the books thus acquired, or subsequently purchased to be loaned within the state to libraries, schools, colleges, universities, library associations, farmers' institutes, granges, study clubs, charitable and penal institutions and individuals, free of cost except for transportation, under such conditions and rules as shall protect the interests of the state and best increase the efficiency of the service it is expected to render the public. [29 G. A., ch. 173, § 3.]

**SEC. 2888-e. Secretary — assistants — duties — expenses — office.** Said commission shall employ a secretary not of its own number, who shall serve at the will of the commission, and under such conditions as it shall determine. It may also employ such other assistants as shall be requisite in the performance of the work of the commission as set forth in sections two (2) and three (3) and number of assistants and their salaries and the salary of the secretary shall be fixed by the committee on retrenchment and reform. It shall be the duty of said secretary to keep a record of the proceedings of the commission; to keep accurate accounts of its financial transactions, and to act under the direction of the commission in supervising the work of the traveling libraries, in organizing new libraries and improving those already established, and in general to perform such other duties as may be assigned him by the commission. In addition to his salary he shall be allowed his necessary traveling expenses while absent from his office in the service of the commission, the same to be verified and certified and paid in the same manner as other expenses incurred by the commission. Said commission to have its office in the state library with storage and shipping room in the basement of the capitol. The work in connection with the associate libraries shall be conducted by the library commission. [29 G. A., ch. 173, § 4.]

**SEC. 2888-f. Biennial report.** The secretary of the commission shall make a full report to the governor on library conditions and progress in Iowa on July first, nineteen hundred three (1903), with sketches of the free public libraries and illustrations of such library buildings as said commission may deem expedient: two thousand (2,000) copies of this report shall be printed, one thousand (1,000) of which shall be bound in cloth, and biennially thereafter a like report shall be made to the governor, two thousand (2,000) copies of which shall be printed, one thousand (1,000) of the same to be bound in cloth, these reports to be printed and bound by the state the same as other public documents, and to be distributed under the direction of the commission, and such other printing and binding provided by this act shall be done by the state when allowed by the executive council. [29 G. A., ch. 173, § 5.]

**SEC. 2888-g. Reports from libraries.** The commission shall each year obtain from all free public libraries reports showing condition, growth, development and manner of conducting said libraries, and shall obtain reports from other libraries in the state at their discretion, and shall furnish annually to the secretary of state such information for publication in the Iowa official register as may be deemed of public interest. [29 G. A., ch. 173, § 6.]

**SEC. 2888-h. Expenses—appropriation.** No member of the commission shall ever receive any compensation for service as a member, but the traveling expenses of members in attending meetings of the commission or in visiting or establishing libraries; and other incidental and necessary expenses connected with the work of the commission, shall be paid, including the necessary expense in the maintenance and extension of the traveling library system, provided that the whole amount of said expense and salaries shall not exceed the sum of six thousand (\$6,000) dollars in any one year, not more than three thousand five hundred (\$3,500.00) dollars of said sum to be used in the payment of salaries and expenses of the commission and secretary. All bills incurred by the commission or by its members under the law shall be certified by the president and secretary of the commission to the state auditor, who shall issue warrants therefor upon the state treasury, and there is hereby annually appropriated from any funds in the state treasury not otherwise appropriated the sum of six thousand dollars, (\$6,000) to carry into effect the provisions of this act, and any balance not expended in any one year may be added by the commission to the expenditure for any ensuing year. All accounts and bills for expenses of the secretary and members of the commission and all bills for expenditures by the commission, shall be itemized and verified and be audited and allowed by the executive council before being paid. [29 G. A., ch. 173, § 7.]

# PART SECOND.

## PRIVATE LAW.

### TITLE XIV.

#### OF RIGHTS OF PROPERTY.

#### CHAPTER 1.

##### OF THE RIGHTS OF ALIENS.

#### SECTION 2889. Non-resident aliens—acquiring and holding real-estate.

[For earlier annotations, see code, pages 977-8.—Ed.]

A right to inherit cannot be derived from a parent who has died a non-resident alien and who would on that account not have been entitled to the property if living. *Meier v. Lee*, 106-303.

**SEC. 2889-a. Real property.** That all corporations organized under the laws of any foreign country, and corporations organized under the laws of any state of the United States, one-half of whose stock is owned and controlled by non-resident aliens, shall have the right to own, hold, and dispose of any real property owned or held by any such corporations on the fourth day of July, 1888, or any real property acquired by any such corporations under the provisions of section six (6) of chapter eighty-five (85) of the laws of the twenty-second general assembly, or section twenty-eight hundred and ninety (2890) of the code. Provided, however, that any such corporation shall sell or dispose of any such property now owned by it within ten years from the taking effect of this act, and in default of such sale or disposition the provisions of sections twenty-eight hundred and ninety-one (2891), twenty-eight hundred and ninety-two (2892) and twenty-eight hundred and ninety-three (2893) of the code shall be applied thereto. [28 G. A., ch. 117, § 1.]

**SEC. 2889-b. Bona fide contract.** A *bona fide* contract for the sale of any such lands owned by any such corporation shall be held and considered as a sale within the provisions of the preceding section, and a good and valid deed of conveyance may be made by such corporation at any time upon the fulfillment of such contract by the purchaser of any such lands. [28 G. A., ch. 117, § 2.]

**SEC. 2889-c. Sales, contracts, deeds, and conveyances legalized.** All sales, contracts, deeds, or conveyances of lands owned by any such corpo-

ration on the fourth day of July, eighteen hundred and eighty-eight (1888), or acquired by any such corporation under the provisions of section six (6) of chapter eighty-five (85) of the laws of the twenty-second general assembly, or section twenty-eight hundred and ninety (2890) of the code, bearing date on or after the fourth day of July, eighteen hundred and eighty-eight (1888), are hereby legalized and rendered of full force and effect, according to their terms, in so far as their validity or the validity of the titles conveyed thereby may be affected by chapter eighty-five (85) of the laws of the twenty-second general assembly, or any amendments thereto, or by chapter one (1), title fourteen (XIV) of the code. [28 G. A., ch. 117, § 3.]

### CHAPTER 3.

#### OF PERPETUITIES AND GIFTS.

##### SECTION 2901. Disposition of property.

[For earlier annotations, see code, page 981.—Ed.]

A railroad lease for a long term of years is not void under the statutory provisions against perpetuities. *R. & W. Co. v. Trust Co.*, 82 Fed., 524; *First Nat. Bank v. Sioux City Terminal R. & W. Co.*, 69 Fed., 441.

### CHAPTER 4.

#### OF THE TRANSFER OF PERSONAL PROPERTY.

##### SECTION 2905. Conditional sales—recording.

[For earlier annotations, see code, pages 982-3.—Ed.]

Where a cash register was sold with a condition that the title should not pass to the purchaser until payment therefor was made, and there was no recorded instrument evidencing such sale, held that an attachment levied on the register and other property of the purchaser took priority over the title of the seller. *National Cash Register Co. v. Broeksmit*, 103-271.

A reservation of the title to the property by the vendor without recording is not valid as against a subsequent mortgagee without notice, although the subsequent mortgage is not recorded. *Union Bank v. Creamery Package Mfg. Co.*, 105-136.

The instrument should be signed by the vendor or lessor; this is the plain provision of the statute. *National Cash Register Co. v. Schwab*, 111-605.

A conditional sale, such as is referred to

in this section, involves delivery to the vendee as owner with reservation to the vendor of the title only for the purpose of security. Where the contract provides that there shall be no delivery until payment, the mere fact that the agent of the seller gives possession to the buyer for a temporary purpose does not bring the case within the provisions of the statute. Possession cannot be relied on as sufficient evidence of title. *Gaar v. Nichols*, 88 N. W., 382.

This section refers to sales which are to take effect on a condition to be performed by the vendee, and not to those conditioned on performance of some agreement by the vendor. *Davis Gasoline Engine Co. v. McHugh*, 88 N. W., 948.

Section applied. *Thomson v. Smith*, 112-718.

##### SEC. 2906. Sales or mortgages—recording.

[For earlier annotations, see code, pages 988-992.—Ed.]

Possession in third person. This section does not apply where the property at the time of sale or mortgage is not in the possession of the vendor or mortgagor. Possession may be taken by symbolical delivery, as by the turning over of the key to the premises where the property is kept. *Frank v. Levi*, 110-207.

Fraud. Under the circumstances of a particular case, held that mortgagees used reasonable dispatch in causing their mortgages to be filed for record and that therefore they were not guilty of fraud although the mortgages were not recorded before credit was extended to the mortgagor. *Spencer Co. v. Papach*, 103-513.

**Existing Creditors.** Failure to record a mortgage will not render it invalid as to a creditor whose claim antedates the giving of the mortgage. *Garner v. Fry*, 104-515.

**Actual Notice.** Notice to an agent, even though by information brought to his knowledge before the beginning of his agency, will be presumed to have been retained for a reasonable time. *McClelland v. Saul*, 113-208.

Such notice of a chattel mortgage as would put a reasonably prudent person on inquiry will affect an officer levying a writ of attachment with notice of such mortgage, although it is not recorded. *German Sav. Bank v. Armour Packing Co.*, 75 N. W., 503.

An attaching creditor taking with actual notice is not protected against an unrecorded mortgage. Notice is sufficient if such as to put a reasonable man upon inquiry which would certainly lead to the knowledge or discovery of the rights of the mortgagee. *Aultman & Taylor Mach. Co. v. Kennedy*, 114-444.

The burden is on the party claiming as against an unrecorded chattel mortgage to show that he took without notice. *Diemer v. Guernsey*, 112-393.

**Innocent purchaser.** A mortgagee under a mortgage to secure a pre-existing debt is not protected. *Flannigan v. Althouse*, 56-513; *Meyer v. Evans*, 66-179.

Where the mortgagee on the execution of the mortgage to secure an antecedent debt grants an extension of time on the debt secured he becomes entitled to protection under the recording laws. *Union Bank v. Creamery Package Mfg. Co.*, 105-136.

**Description.** A defective description may be cured by a subesquent delivery of the property to the mortgagee as against persons who have not acquired any right or interest before such delivery. *Kelley v. Andrews*, 102-119.

Where the chattel mortgage described several mares "and all increase of said mares and the increase of the increase." held, that such description included future increase of the animals described and not merely the increase in existence at the time of the execution of the mortgage. *Hopkins Fine Stock Co. v. Reid*, 106-78.

In determining whether particular articles are covered by a chattel mortgage on a stock of goods under the head of furniture and fixtures, the situation of the parties and all the surrounding circumstances may be considered in determining the intent. *Brody v. Chittenden*, 106-524.

In such case held that jewelers might be asked as witnesses to state whether regulators were regarded by the trade as part of the stock or as fixtures or as tools. *Ibid.*

The term "furniture" used in a chattel mortgage of a stock of jewelry may cover implements and instruments used in the business. *Ibid.*

Where there is no statement as to possession, ownership or location of the property, but only an enumeration of items, the description is insufficient to impart constructive notice. *Iowa Lumber Co. v. Cassidy*, 107-564.

Where the mortgage named certain items of property, and indicated by its provisions that the mortgagor was the owner of an interest in the property, and that it was located in the county where it was recorded, held that the description was sufficient to impart record notice. *Preston v. Caul*, 109-443.

Whether certain property, corresponding to the description in the mortgage, was intended to be included is for the jury, while it is for the court to say whether the description is sufficient to impart notice of such an intention to third persons. *Chipman v. Weiny*, 112-702.

The whole description should be considered in determining whether or not a third person aided by the inquiry which the instrument itself suggests would be enabled to identify the property. It is error for the court to instruct that a defect or inaccuracy in the description is immaterial. *Packers' National Bank v. Chicago, M. & St. P. R. Co.*, 114-621.

A description in a chattel mortgage of "one hundred and one yearlings and two year olds, branded with the letter F on left hip," held sufficient to warrant the introduction of parol evidence to show that the description was used with reference to certain animals intended by the parties to be covered by the mortgage. *Frick v. Fritz*, 88 N. W., 961.

**Priority.** Where sale of machinery was made to a tenant on condition that it should be set up on the premises, and a chattel mortgage given for the purchase price when accepted, held that the chattel mortgage took priority over the landlord's lien, although not recorded until some days after the machinery was set up and accepted. *Davis Gasoline Engine Co. v. McHugh*, 88 N. W., 948.

**When recording necessary.** An unrecorded mortgage is not invalid as between the parties. *Aultman & Taylor Mach. Co. v. Kennedy*, 114-444.

A contract with reference to a stock of goods, which did not provide for any lien thereon or transfer of title thereto, held not to be within the terms of the recording law. *Clement v. Swanson*, 110-106.

**Books of account.** No record is required of the assignment of books of account which are turned over to the assignee. *Preston v. Peterson*, 107-244.

Where possession in such case was delivered to the assignee, held that subsequent possession by the assignor for a temporary purpose would not render the sale invalid for want of recording. *Ibid.*

**Recording in another state.** Recording of a chattel mortgage in North Dakota,

where the mortgagor resides, held to be of no effect with reference to property covered by the mortgage situated in this state. *Aultman & Taylor Mach. Co. v. Kennedy*, 114-444.

As a general rule the law of the place where the property is situated at the time of the transfer governs the validity of the mortgage under the recording acts. *Ibid.*

**Wife joining.** A mortgage on one of three teams of horses, any one of which might be claimed as exempt from execution, is valid without the joinder of the wife therein. The acts of the husband in executing the mortgage constitute an election to claim one of the other teams rather than the team mortgaged as exempt. *Grover v. Younie*, 110-446.

## CHAPTER 5.

### OF REAL ESTATE.

#### SECTION 2913. Estate in fee simple.

[For earlier annotations, see code, page 994.—Ed ]

A fee may be created without the use of the word "heirs," and where a conveyance was made to the wife without limitation in the granting clause, but with a subsequent condition that the property was for her sole use and that she was not to have

the privilege of deeding or mortgaging it, held that the granting clause vested in the wife a fee title, and that the condition was void as a restraint upon alienation. *Teany v. Mains*, 113-53.

#### SEC. 2918. Declarations of trust.

[For earlier annotations, see code, pages 995-6.—Ed ]

This provision appears to relate to transactions other than those of a testamentary nature. *Moran v. Moran*, 104-216.

Parol evidence is admissible to affix a trust to an unconditional devise only where it shows that the devisee by fraud induced the testator to make the devise on the representation that the devisee would take in trust for another who was the real object of the bounty. *Ibid.*

The theory of a resulting trust is that he who supplies the purchase money intends it to be for his own benefit and not for that of another, and that the conveyance is taken in the name of another as a matter of convenience or arrangement between them. If two or more advance the price and the deed is taken in the name of one only, a trust will result in favor of the other for a share proportionate to the part of the price paid. Payment to raise a trust *pro tanto* must be for an aliquot part of the property. The burden being on the party alleging the trust to clearly establish it, the evidence must show that payment for an aliquot part was intended. *Culp v. Price*, 107-133.

A father paying the purchase price of land, the title being taken in his son's name, has a resulting trust therein unless the money paid is by way of advancement. But before the legal title will be disturbed

the resulting trust must be established by clear and satisfactory evidence, and the presumption that the law raises that the conveyance is by way of advancement must be overcome by proof of the contrary intention. *Ibid.*

The father's testimony as to his intention is competent in such a case as are also his declarations made at the time. The fact that the son has already been provided for and that the father and other children are left unprovided for may also be taken into account. *Ibid.*

Evidence that the consideration for a conveyance was to be furnished after it was delivered will not show a resulting trust. *Burkhardt v. Burkhardt*, 107-369.

Where the trustee or other fiduciary buys property in his own name, but with trust funds, a resulting trust arises under the operation or construction of law. *Williams v. Williams*, 108-91.

An express agreement creating a trust cannot be proven by parol evidence, and the breach of an express promise to hold title for another will not constitute fraud on which a court of equity will build up a constructive trust. *Andrew v. Andrew*, 114-524.

Section applied. *Gregory v. Bowlsby*, 88 N. W., 822.

#### SEC. 2919. Conveyances by married women.

[For earlier annotations, see code, page 996.—Ed.]

This section does not authorize the execution by the wife to the husband of a power of attorney, authorizing him to con-

vey her contingent dower interest in his property. *Sawyer v. Biggart*, 114-489.

**SEC. 2921. Covenants.**

[For earlier annotations, see code page 997.—Ed.]

Section applied. *Blumenthal v. Culver*, 89 N. W., 1116.

**SEC. 2922. Title and possession of mortgagor.**

[For earlier annotations, see code, page 997.—Ed.]

Lawful possession of the premises by the mortgagee can only be obtained by the consent, express or implied, of the mortgagor who is deemed to hold the legal title. *Boggs v. Douglass*, 105-344.

The grantor in a conveyance which is found to be a mortgage is entitled to possession and ownership of the crops until

the expiration of the statutory period for redemption, after a decree determining the nature of his rights. *Harrington v. Foley*, 108-287.

In this state a mortgage does not create an estate, but simply a lien or charge upon the land to secure the debt. *Adams v. Holden*, 111-54.

**SEC. 2923. Tenancy in common.**

[For earlier annotations, see code, page 997.—Ed.]

A conveyance to husband and wife creates a tenancy in common. *Bader v. Dyer*, 106-715.

**SEC. 2924. Vendor's lien.**

[For earlier annotations, see code, pages 997-1000.—Ed.]

The mere taking of a note for the purchase price does not waive the vendor's lien. In order to so operate it must be shown by a clear preponderance of the evidence that such was the express agree-

ment of the vendor. *Zook v. Thompson*, 111-463.

This section has no reference to one who takes property subject to a vendor's lien. *Owen v. Higgin*, 113-735.

## CHAPTER 6.

### OF THE CONVEYANCE OF REAL ESTATE.

**SECTION 2925. Recording.**

[For earlier annotations, see code, pages 1000-1010.—Ed.]

**Effect of recording.** An instrument which is not in fact signed by the grantor nor acknowledged by him is not properly or lawfully recorded and imparts no notice, and no one has a right to rely upon the fact that he apparently signed such instrument. *Sherod v. Ewell*, 104-253.

In searching the records of titles the searcher should go back of the day and hour at which the evidence of title in the holder in question was filed for record, and examine the title with reference to any conveyance and incumbrance by such holder after the date of the conveyance under which he holds title. *Higgins v. Dennis*, 104-605.

Therefore, the searcher of title is charged with notice of an incumbrance recorded on the same day as and prior to the record of the conveyance by which title was acquired by the person executing such incumbrance, provided the incumbrance was executed after the actual execution of the conveyance. *Ibid.*

The law takes no notice of fractions of days with reference to the execution of

deeds and mortgages where the order of their execution does not appear. *Ibid.*

**Subsequent purchasers.** An attaching creditor is not a subsequent purchaser for value. An unrecorded deed or other instrument creating a lien will take precedence over a subsequent attachment, and a purchaser at judicial sale is bound to take notice of all instruments recorded up to the date of the same. *Rea v. Wilson*, 112-517.

Even though an unrecorded mortgage by mistake does not describe the land intended to be covered thereby, still the judgment lien is not entitled to priority over the unrecorded mortgage. Such priority accrues only in favor of the purchaser at judicial sale without notice of the mortgage. *Ibid.*

An attaching creditor is not a purchaser, but takes only the interest which his debtor had in the land at the time of attachment. Consequently an unrecorded deed or prior equity takes precedence over his attachment. But a purchaser at judicial or sheriff's sale, whether he be the

judgment creditor or a stranger, is a purchaser, and is generally protected from prior unrecorded deeds or equities. *Bush v. Herring*, 113-158.

A pre-existing indebtedness is a valuable consideration for the execution of a mortgage as between the parties, and all others having no equitable interest in the property at the time of its execution. *Ibid.*

While the recording of a deed is not essential as against an attaching creditor, its delivery is. *Parlin, O. & M. Co. v. Martin*, 112-640.

An execution purchaser of an heir's interest in realty does not acquire priority over the right existing against the heir to deduct advancements from such interest. *Pinckney v. Collie*, 114-441.

For valuable consideration. A mortgage in a mortgage executed to secure a pre-existing debt is not a bona fide purchaser entitled to priority of lien over a prior unrecorded mortgage on the property. *Smith v. Moore*, 112-60.

Without notice. Although one who takes by quit-claim deed is not an innocent purchaser, and is charged with notice of equities, yet one who takes from such pur-

chaser by warranty deed for value is not affected by outstanding equities of which he had no notice. *Hannan v. Seidentopf*, 113-658.

The burden of proof is upon the purchaser claiming in hostility to an unrecorded deed to show that he was a purchaser for value without notice. *Ibid.*

Possession by a tenant is notice, not only of his own rights, but of the rights of the landlord. *Ibid.*

One who acquires title to property is bound to know not only the rights of those in possession, but also the fact of such possession. *Ibid.*

By acquiescence and silent admission the mortgagee whose mortgage is not recorded tacitly represents to any one acquiring an interest in the property that the mortgagor is the owner of the title, free from incumbrance, and a subsequent purchaser for a consideration does not have the burden of proving want of actual notice. Under such circumstances it is for the mortgagee to show notice to the subsequent purchaser of the prior unrecorded mortgage. *Walter v. Brown*, 88 N. W., 832.

**SEC. 2930. Entries of transfers—or transcript.** Whenever a deed of unconditional conveyance of real estate or transcript as provided in section four thousand two hundred and fifty-nine (4259) is presented, the auditor shall enter in the index book, in alphabetical order, the name of the grantee, and opposite thereto the number of the page of the transfer book on which such transfer is made; and upon the transfer book he shall enter in the proper columns the name of the grantee, the grantor, date and character of the instrument, the description of the real estate, and the number or letter of the plat on which the same is marked. [C. '73, § 1951.] [27 G. A., ch. 106, § 2.]

**SEC. 2942. Acknowledgment of conveyances or incumbrances.** The acknowledgment of any deed, conveyance or other instrument in writing by which real estate in this state shall be conveyed or incumbered, if made within this state, must be before some court having a seal, or some judge or clerk thereof, or some county auditor or his deputy, or justice of the peace within the county, or notary public within the county of his appointment or in an adjoining county in which he has filed with the clerk of the district court a certified copy of his certificate of appointment. And each of the officers above named is authorized to take and certify acknowledgments of all written instruments, authorized or required by law to be acknowledged. [25 G. A., ch. 52; 22 G. A., ch. 99; C. '73, §§ 277, 1955; R., §§ 201, 2226; C. '51, § 1217.] [27 G. A., ch. 96, § 1.]

[For earlier annotations, see code, pages 1015-16.—Ed.]

**What sufficient.** Under statutory provisions prior to the present Code an acknowledgment by a deputy clerk of the district court was valid. *Hilpire v. Claude*, 109-159.

One having an interest, direct or contingent, in a conveyance, or its subject-matter, cannot take and certify an acknowledgment, and the record of an instrument so acknowledged does not impart notice to third persons of the mortgagee's inter-

est thereunder. But the mere fact that one is an officer of a corporation, or an agent of a co-partnership, does not disqualify him from taking an acknowledgment of an instrument made to his principal. *Bardsley v. German-American Bank*, 113-216.

Neither party to the conveyance can take his own acknowledgment of it before himself so as to entitle it to be recorded. *Blackman v. Henderson*, 87 N. W., 655.

**Legalizing acts.** In a legalizing act declaring valid instruments defectively acknowledged, but duly recorded, held that the words "duly recorded" meant "actually recorded." *Bresser v. Saarman*, 112-720.

Such a legalizing act, relating in general to the recording of instruments defectively acknowledged, held applicable to an instrument of adoption. *Ibid.*

An act legalizing the recording of conveyances defectively acknowledged is not effective as against a purchaser in good faith without notice before the taking effect of the act. *Blackman v. Henderson*, 87 N. W., 655.

An act legalizing the recording of conveyances defectively acknowledged is not effective as against a purchaser in good faith without notice before the taking effect of the act. *Blackman v. Henderson*, 87 N. W., 655.

#### LEGALIZING ACTS.

**SEC. 2942-a. Acknowledgments legalized.** That the acknowledgments of all deeds, mortgages, or other instruments in writing heretofore taken or certified, and which instruments have been recorded in the recorder's office of any county of this state, including acknowledgments of instruments made by any private or other corporation, or to which such corporation was a party, or under which such corporation was a beneficiary, and which have been acknowledged before or certified by any notary public who was at the time of such acknowledgment or certifying a stockholder or officer in such corporation, be and the same are hereby declared to be legal and valid official acts of such notaries public, and to entitle such instruments to be recorded, anything in the laws of the state of Iowa in regard to acknowledgments to the contrary notwithstanding. [26 G. A., extra sess., ch. 23, § 1.]

**SEC. 2942-b. Saving clause.** This act shall not affect the rights of parties in any action or suit now pending in any court of this state. [26 G. A., extra sess., ch. 23, § 2.]

[For other legalizing and curative acts relating to acknowledgments, see 13 G. A., chapter 160, section 1; 14 G. A., chapter 110, section 1; 17 G. A., chapter 164, section 1; 18 G. A., chapter 108; 20 G. A., chapter 203; 24 G. A., chapter 42.—Ed.]

**SEC. 2942-c. Legal and valid.** That all acknowledgments of instruments, in writing, taken and certified according to the provisions and form prescribed by the code of 1873, which were taken and certified after the twenty-ninth day of September, 1897, and prior to the passage of this act, by officers having authority under the provisions of the code of 1873 to take and certify acknowledgments, are here declared to be legal and valid, and of the same force and effect as though the same were taken and certified according to the form and provisions of the code; and as though the officers taking and certifying the same were authorized to take and certify acknowledgments. [27 G. A., ch. 165, § 1.]

**SEC. 2942-d. Acknowledgments by interested stockholders.** That all deeds and conveyances of lands within this state heretofore executed but which have been acknowledged or proved according to and in compliance with the laws of this state before a notary public or other official authorized by law to take acknowledgments who was, at the time of such acknowledgment, an officer or stockholder of a corporation interested in any such deed or conveyance, or otherwise interested therein, are, if otherwise valid, hereby declared effectual and valid in law to all intents and purposes as though acknowledged or proved before an officer not interested therein; and if heretofore recorded in the respective counties in which such lands may be, the records thereof are hereby confirmed and declared effectual and valid in law to all intents and purposes as though said deeds and conveyances, so acknowledged or proved and recorded, had (prior to being recorded) been acknowledged or proved before an officer having no interest therein. [27 G. A., ch. 166, § 1.]

**SEC. 2942-e. Acknowledgments defective in form—legalized.** That the acknowledgments of all deeds, mortgages or other instruments in writing, taken and certified previous to the passage of this act, and which have been duly recorded in the proper counties in this state, and which are defective only in the form of the certificate of the officer tak-

ing the same, or by reason of such acknowledgment having been made before an official not qualified to take the same, but who was at the time qualified to take acknowledgments generally, be and are hereby declared to be as legal and valid for all purposes as if the form of the certificate had been made in accordance with law, and the official taking such acknowledgments duly qualified therefor. [29 G. A., ch. 249, § 1.]

**SEC. 2942-f. Legalizing—conveyances under power of attorney to husband or wife.** No conveyance of real estate heretofore made, wherein the husband or wife conveyed or contracted to convey the inchoate right of dower of the other spouse, acting as the attorney in fact, by virtue of a power of attorney executed by each spouse, such power of attorney not having been executed as a part of a contract of separation, shall be held invalid as contravening the provisions of section three thousand one hundred and fifty-four (3154) of the code, but all such conveyances are hereby legalized and made effective. [29 G. A., ch. 237, § 1.]

**SEC. 2943. Out of state.** When made out of the state but within the United States, it shall be before a judge of some court of record, or officer holding the seal thereof, or some commissioner appointed by the governor of this state to take the acknowledgment of deeds, or some notary public or justice of the peace; and when made before a judge, or justice of the peace, a certificate, under the official seal of the clerk or other proper certifying officer of a court of record of the county or district, or of the secretary of state of the state or territory, within which such acknowledgment was taken, under the seal of his office, of the official character of said judge, or justice, and of the genuineness of his signature, shall accompany said certificate of acknowledgment. [C. '73, § 1956; R., § 2245.] [27 G. A., ch. 97, § 1.]

[For annotations, see code, page 1016.—Ed.]

**SEC. 2943-a. Notarial seals of nonresidents.** That the notarial seal which purports to have been affixed to any instrument in writing, by any notary public residing elsewhere than in the state of Iowa, shall be *prima facie* evidence that the words thereon engraved conform to the requirements of the law of the place where such certificate purports to have been made. [28 G. A., ch. 118, § 1.]

**SEC. 2948. Certificate of acknowledgment.**

[For earlier annotations, see code, pages 1017-1019.—Ed.]

The requirement of this section as to stating the full title of the person before whom the acknowledgment is made is not applicable to acknowledgments of other instruments with reference to which there is no such specific requirement, and in the acknowledgment of articles of incorporation it is sufficient that the venue is stated at the beginning of the certificate, and the notary subscribes as a "notary public," without specifically reciting that he is a notary public in and for said county, it being presumed that an officer acts only within the limits of his authority. *Smith v. Sherman*, 113-601.

**SEC. 2958. Forms of conveyances.**

[For earlier annotations, see code, pages 1020-1.—Ed.]

In the absence of warranty or of fraud inducing the conveyance there is no liability of the grantor for failure of title. *Harrison v. Palo Alto County*, 104-383.

## CHAPTER 7.

### OF OCCUPYING CLAIMANTS.

**SECTION 2964. Proceedings.**

[For earlier annotations, see code, pages 1022-4.—Ed.]

This section has no application where the action is purely personal, seeking only a money judgment and not attempting to disturb either title to or possession of real

property. *Central Trust Co. v. Hubinger*, 87 Fed., 3.

Loss or surrender of possession terminates the right to be regarded as an occu-

pying claimant and to have relief as such under these statutory provisions. *Lindt v. Uihlein*, 89 N. W., 214.

### SEC. 2962. Color of title.

[For earlier annotations, see code, pages 1024-5.—Ed.]

One who acquires title to real property in consideration of the illegal sale of intoxicating liquors, in violation of Code § 2423, and whose title is declared void on that account, cannot assert the rights of an occupying claimant with reference to improvements placed by him upon the premises. *Lindt v. Uihlein*, 89 N. W., 214.

The statutory provisions as to occupying claimants furnish a special remedy, and one who seeks to avail himself of those

provisions must bring himself within the statute and pursue the course indicated. *Ibid.*

The proceeding contemplated does not involve recovery of a personal judgment against the land owner, but is in the nature of the assertion of a lien on the property by the party in possession, accompanied by the right to retain such possession until the lien is satisfied. *Ibid.*

## CHAPTER 8.

### OF THE HOMESTEAD.

#### SECTION 2972. Exempt.

[For earlier annotations, see code, pages 1025-8.—Ed.]

Statutes are to be liberally construed in favor of homestead rights. *Merchants' Nat. Bank v. Eyre*, 107-13.

Failure to make the wife a party defendant in proceedings to foreclose a mortgage executed prior to the marriage, will not entitle the wife to relief in an independent action. Her rights in the homestead are not in any way superior to the lien of such a mortgage. *Browneller v. Wells*, 109-230.

Both husband and wife are entitled to live upon and enjoy the homestead. But so long as the wife of the owner chooses to live elsewhere, she is not entitled to any benefit from it and the owner is

entitled to have the full right to farm and cultivate it so long as he continues to live upon and occupy it as a homestead. *Ehrck v. Ehrck*, 106-614.

Evidence in a particular case held not sufficient to show that certain property claimed as a homestead was exempt because the money used in its purchase was obtained from the sale of a former homestead. *Johnson County Sav. Bank v. Carroll*, 109-564.

The owner may dispose of the homestead without regard to the claims of creditors as to which the homestead is exempt. *Dettmer v. Behren*, 106-585.

#### SEC. 2973. Family defined.

[For earlier annotations, see code, page 1028.—Ed.]

After the death of both the father and mother, the children or any number of them continuing to reside on the homestead property as members of the same family constitute a family, entitled to the homestead exemption. *In re Rafferty*, 112 Fed., 512.

The primary object of the exemption is the protection of the family, and as a general rule, when the family ceases to exist the exemption also ceases. Therefore, held that where a widow with children acquired a homestead, her homestead rights in the premises terminated when the children ceased to reside with her. The exception as to continuance of the homestead right to the survivor remaining in possession of a homestead acquired during the existence of the marriage does not apply to such

a case. *Fullerton v. Sherrill*, 114-511; *Gaar v. Wilson*, 88 N. W., 332.

Under this section, as it stood in the Code of '73, which did not include the provision as to a party to whom the homestead is adjudged in a decree of divorce, held that such person did not have the homestead right while continuing to occupy the premises. *Clemans v. Penfield*, 111-511.

The provision as to cases of divorce is intended to apply to cases wherein the title to the homestead is in one of the parties to the divorce proceeding, and the court deems it proper to assign the homestead to the other so that the decree is the basis upon which the right to occupy the premises after the divorce is founded. *In re Pope*, 98 Fed., 722.

**SEC. 2974. Conveyance or incumbrance.**

[For earlier annotations, see code, pages 1028-32.—Ed.]

It seems that a sale by the husband alone of the fee title to the homestead, in which he reserves the right to use and occupy the property during the life of himself and wife, is valid and binding. *Allbright v. Hannah*, 103-98.

Where the husband has received money under a contract to convey the homestead in which the wife does not join, an action may be maintained against him to recover the amount so paid. *DeKalb v. Hingston*, 104-23.

Failure of the wife to join in a conveyance of the homestead renders the conveyance invalid for any purpose. *Goodwin v. Goodwin*, 113-319.

Where persons living together as husband and wife under a claimed marriage, which is invalid because the pretended husband has a former wife living undivorced, of which fact the pretended wife has no knowledge, a conveyance by the pretended husband of premises owned by him and used by the two as a home will not be invalid on account of failure of the pretended wife to join therein. *Ibid.*

The owner of the homestead may grant an easement therein without joinder by

the husband or wife of such owner. *Stokes v. Maxson*, 113-122.

Where the owner of premises, a portion of which is used as a homestead contracts to sell a part thereof, not including the improvements, and leaving enough property in extent and value to constitute the full homestead exemption, such contract is not invalid because of the failure of the husband or wife to join therein, though the portion sold might have been included in the homestead, had the owner elected to do so. The owner may select the homestead without the consent of the husband or wife. *Hall v. Gottsche*, 114-147.

A deed covering other property together with the homestead may be valid as to the property not included in the homestead. *Pryne v. Pryne*, 89 N. W., 108.

Under the last clause of this section, which is first found in the present Code, the vendee under a contract to convey premises including a homestead may enforce his contract as to the portion not embraced in the homestead, the price to be paid being abated by deduction of the value of the portion embraced in the homestead. *Townsend v. Blanchard*, 90 N. W., 519.

**SEC. 2976. Liable for debts antedating purchase—by written contract.**

[For earlier annotations, see code, pages 1032-5.—Ed.]

**Debts prior to acquisition.** Where it is claimed that the homestead is liable for money borrowed to be used in paying therefor, it is not enough to show that the borrowed money was so used, but in order to confer a right to the lien it must also appear that it was a part of the contract that this should be done. *Johnson County Sav. Bank v. Carroll*, 109-564.

To render the homestead liable for money borrowed to pay the purchase price it must appear that the indebtedness was incurred at the time the homestead right attached. *Ibid.*

Where at the time the homestead was taken possession of the indebtedness which was subsequently attempted to be enforced against it had not been incurred, held that the homestead was not liable to such indebtedness. *Ibid.*

In a particular case, held, that the evidence did not show that a note was executed in renewal of a prior note antedating the homestead so as to make the indebtedness a claim against the homestead. *In re Gardner's Estate*, 103-738.

The owner may make expenditures on the homestead and improvements thereto necessary to its preservation and suitability for homestead occupation, and the expenditures therefor are protected as a part of the homestead right, even as

against indebtedness contracted before the making of the improvements, though after the acquisition of the homestead. *Ebersole v. Moot*, 112-596.

The homestead law has always received liberal construction in favor of the homestead occupant out of consideration of public policy and the very humane and beneficent purpose that inspired the enactment of the law. *Ibid.*

**Exhausting other property.** It is not necessary to provide in a decree of foreclosure that the other real property covered by the lien shall be exhausted before resorting to the homestead. The statutes relating to homesteads make ample provision for the protection of homestead rights from sale on execution until other property of the judgment debtor is exhausted. *Kilmer v. Gallagher*, 107-676.

One who buys premises not constituting the homestead and assumes the payment of a mortgage covering such premises and also the homestead cannot afterwards enforce the mortgage as against the homestead. *Moore v. Olive*, 114-650.

**Lien of judgments.** A judgment becoming a lien upon premises before the occupancy of such premises as a homestead may be enforced and the grantee does not have priority over the judgment lien. *Therme v. Bethenoid*, 106-697.

**SEC. 2977. What constitutes.**

[For earlier annotations, see code, pages 1036-9.—Ed.]

**Separate tracts.** The homestead must embrace the house used as a home, and none other can be selected, but if there are two so used, either may be retained. *Knorr v. Lohr*, 108-181.

Under the provisions of the Code of '73, a homestead might consist of lots or tracts not contiguous, but in such case it must be shown that such lots or tracts were habitually and in good faith used as a part of the same homestead. *Kelley v. Williams*, 110-153.

**Abandonment.** An oral contract for the sale of the homestead, followed by possession taken thereunder, amounts to an abandonment of the homestead. *Allbright v. Hannah*, 103-98.

While there may be a homestead right in premises held under a contract to convey, yet where husband and wife consented that the vendor should treat the contract as forfeited by reason of provisions therein for forfeiture on non-payment of the purchase price, and the husband accepted a lease of the premises under which husband and wife continued to occupy, held, that the homestead right under the contract was abandoned. *Anderson v. Cosman*, 103-266.

Where the homestead character of the land is established, the burden of proof to show that it is liable for debts by reason of abandonment is upon the person making such claim. *Robinson v. Charleton*, 104-296.

When a person removes from his homestead for a temporary cause with the definite and settled purpose of returning, and that purpose is continuously held in good faith, there is no abandonment of the homestead right. *Maguire v. Hanson*, 105-215.

To constitute a homestead it is not sufficient that the claim is supported by the

cultivation and use of the property. Actual occupation of the premises as a home for the owner and his family is required excepting in a few cases, as where a temporary absence from the home for authorized purposes will not affect its homestead character, or where the proceeds of one homestead are invested in property to be used for another homestead, in which case a reasonable time is allowed in which to make a change. But a mere intent to erect upon a lot or tract of land a house to be occupied as a home at some indefinite time, is not sufficient to give to the property the homestead character. *Ibid.*

Where there is no dwelling house to be occupied, the premises cannot constitute a homestead. *Blue v. Heilprin*, 105-608.

Where the homestead was abandoned by the owner without intention to return thereto, and two days later he made a conveyance of the premises, held, that the purchaser did not acquire the property free from debts which would have attached to it had it not been a homestead. *Chambers v. Jackson*, 106-6.

Removal from the homestead with intention to return only in a contingency which the owner wishes to avoid, as for instance if he intends "to go back to the place provided he cannot sell it," will constitute an abandonment. *Conway v. Nichols*, 106-358.

Where the evidence shows an intent to return, the period of absence alone being conditional, there is no abandonment. *Rand Lumber Co. v. Adkins*, 89 N. W., 1104.

A temporary removal from the homestead and renting it to third parties will not be deemed an abandonment if the party having the homestead right intends to return and resume the occupancy thereof. *In re Pope*, 98 Fed., 722.

**SEC. 2978. Extent—dwelling—appurtenances—value.** If within a city or town plat, it must not exceed one-half acre in extent, otherwise it must not contain in the aggregate more than forty acres, but if, in either case, its value is less than five hundred dollars, it may be enlarged until it reaches that amount. It must not embrace more than one dwelling-house, or any other buildings except such as are properly appurtenant thereto, but a shop or other building situated thereon, actually used and occupied by the owner in the prosecution of his ordinary business, and not exceeding three hundred dollars in value, is appurtenant thereto. [C. '73, §§ 1996-7; R., §§ 2884-5; C. '51, §§ 1252-3.] [28 G. A., ch. 119, § 1.]

[For earlier annotations, see code, pages 1039-40.—Ed.]

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

To limit the homestead to one-half acre, under the provisions of § 1996, Code of '73, differing in language from this section, it was necessary that it lie not only

within the limits of the municipality, but within a platted portion thereof, and held that such limitation did not apply where a tract of land not within the municipality was platted, and then the municipality was extended to include it. *Parrott v. Thiel*, 90 N. W., 745.

**SEC. 2979. Selecting—plating—notice to plat and record.** The owner, husband or wife, may select the homestead and cause it to be platted, but a failure to do so shall not render the same liable when it otherwise would not be, and a selection by the owner shall control. When selected, it shall be marked off by permanent, visible monuments, and the description thereof shall give the direction and distance of the starting point from some corner of the dwelling, which description, with the plat, shall be filed and recorded by the recorder of the proper county in the homestead book, which shall be, as nearly as may be, in the form of the record books for deeds, with an index kept in the same manner. Should the homestead not be platted and recorded at the time levy is made upon real property in which a homestead is included the officer having the execution shall give notice in writing to said owner, and the husband or wife, of such owner if found within the county to plat and record the same within ten days after service thereof; after which time said officer shall cause said homestead to be platted and recorded as above, and the expense thereof shall be added to the costs in the case. [C. '73, §§ 1998-9; R., §§ 2286-7; C. '51, §§ 1254-5.] [27 G. A., ch. 98, § 1.]

[For earlier annotations, see code, pages 1040-1.—Ed.]

Where a tract of eighty acres was occupied as a homestead, and a contract to convey forty acres of it was made to a son-in-law of the owner on condition that he should build a house and live thereon, which he did, held, that such contract constituted an election to regard the other forty acres of the tract as a homestead and was an abandonment of any homestead right in the tract referred to. *Allbright v. Hannah*, 103-98.

The selection of the homestead by the owner must control. *Ehrck v. Ehrck*, 106-614.

The owner may select the homestead without the consent of the husband or wife, and by a conveyance, incumbrance or contract may limit the selection by excluding from the homestead a portion of premises which might be included therein, but

not necessary to its existence to the full extent allowed by law. *Hall v. Gottsche*, 114-147.

Where the owners gave notice to the sheriff as to the portion of the premises claimed as a homestead and he offers the portion not included before selling the whole, the sale is not void, although the sheriff does not plat the homestead as here required. *Ackerman v. Hendricks*, 90 N. W., 522.

Where the portions of the premises not included within the homestead were offered in forty acre tracts without bids being made, held that the sheriff was not bound to offer the entire portion of the premises not included within the homestead before proceeding to sell the entire premises. *Ibid.*

### SEC. 2981. Changes.

[For earlier annotations, see code, pages 1041-2.—Ed.]

What will be a reasonable time during which the homestead may be held for the purpose of exchanging it or selling it and investing the proceeds in another home, must depend on the facts of each particular case. *Robinson v. Charleton*, 104-296.

While the right of homestead will not attach to vacant land acquired by purchase, independently of a change of homestead, it will attach to vacant land taken in exchange for the homestead, or bought with the proceeds of the homestead, when

held in good faith for use as a home. *Blue v. Heilprin*, 105-608.

The property acquired for a new homestead will not be exempt from antecedent debts except to the extent in value of the old homestead. *Ibid.*

A lot purchased with money previously realized by the execution of a mortgage on the homestead is not exempt under this section. *Boettger v. Galloway*, 88 N. W., 831.

### SEC. 2985. Occupancy by surviving spouse—descent.

[For earlier annotations, see code, pages 1043-6.—Ed.]

**Election by widow.** Where it does not appear that the widow has elected to take a homestead right in lieu of dower, the presumption is that she takes the dower right. *Peebles v. Bunting*, 103-489.

The fact that the widow continues to reside upon a portion of the land belonging

to her husband does not constitute an election to occupy the homestead for life in lieu of dower, where it does not appear that the premises occupied by her constituted the homestead of her deceased husband. *Ibid.*

The right to the distributive share is

primary, and an election is necessary in order to retain the homestead for life. *Wold v. Berkholz*, 105-370.

Continuance in possession for more than ten years, but under an arrangement by which the wife was asserting her right to a distributive share and not a claim to the homestead, held not sufficient to show an election of the homestead right. *Ibid.*

The primary right of the widow is the distributive share and unless she does something which in law amounts to an election to take the homestead in lieu thereof, the court will award her the distributive share provided by statute. Occupancy for less than a year before commencing proceedings to recover her distributive share held not to bar her right. *In re Estate of Lund*, 107-264.

The answer of the widow setting up the homestead character of the premises in another case in which she was not called upon to make an election between occupancy of the homestead and a distributive share held not to bar her right to the distributive share. The mere contention of the widow that she has elected to take the homestead, made before the time when she is required to make the election, will not deprive her of her distributive share. *Ibid.*

The primary right of the surviving spouse is to the distributive share; an election is called for when such survivor desires to take the homestead right. In a particular case held that the occupancy of the homestead was not such as to show an election to retain it in lieu of dower. The presumption of election to take the

homestead, which might arise from continuance of occupancy, may be rebutted otherwise than by the actual setting apart of the distributive share. *McDonald v. Young*, 109-704.

There is no presumption that the continued occupancy of the homestead is by virtue of an election to retain the homestead for life, unless it appears that such occupancy is inconsistent with any other right to thus occupy. *Percifield v. Aumick*, 89 N. W., 1101.

As to election between homestead and distributive share, see also notes in this supplement to Code § 3377.

**Descent—exemption.** The taking of a distributive share in the estate divests the homestead right, and the widow does not hold the distributive share thus taken exempt from liability for her debts. *Benjamin v. Doerscher*, 105-391.

The fact that the widow proposes to invest the proceeds of such distributive share in a new homestead will not exempt such proceeds from liability. *Ibid.*

An existing obligation of the heir is an indebtedness in such sense that the heir takes the homestead exempt therefrom. *Merchants' Nat. Bank v. Eyre*, 107-13.

Where the testator devised all his property to his widow for life, with the stipulation that after her death whatever remained should be divided among his children, held that the share of the proceeds of the homestead received by each child was not exempt from execution under this section. *First Nat. Bank v. Willie*, 87 N. W., 734.

## CHAPTER 9.

### OF LANDLORD AND TENANT.

#### SECTION 2988. Apportionment of rent.

This section relates to an apportionment of rent between the executor and the reversioner *pro rata* as to time and with reference to rent not accrued, that is, not

due at the time of the death of the life tenant. *Gudgel v. Southerland*, 90 N. W., 623.

#### SEC. 2991. Tenant at will—notice to quit.

[For earlier annotations, see code, pages 1047-8.—Ed.]

One in possession with the assent of the owner, in the absence of further proof, is presumed to be a tenant at will. *Fischer v. Johnston*, 106-181.

The thirty days' notice in writing to terminate a tenancy at will is not required where the tenant does not occupy the premises with the assent of the landlord after the termination of the written lease. *McClelland v. Wiggins*, 109-673.

While at common law a tenancy from

year to year might be implied from a holding over under a written lease, which had expired, held that the provision of this section as to termination of a tenancy at will is applicable in such case, and while the tenant was bound to make payments according to the provisions of the written lease, the landlord did not have a lien for a longer time than that required for the termination of the tenancy by notice. *German State Bank v. Herron*, 111-25.

**SEC. 2992. Landlord's lien.**

[For earlier annotations, see code, pages 1049-51.—Ed.]

**Nature and extent.** The lien attaches to crops grown upon the leased premises, whether they are exempt from execution or not. The provision that the lien does not apply to property exempt from execution relates only to "any other personal property of the tenant which has been used on the premises during the term." *Hipsley v. Price*, 104-282.

Where the landlord seeks to establish a lien as to property owned by the lessee and used on the demised premises, the burden is not on him to show also that such property is not exempt from execution for the debts of the tenant, the grantee of such property relying upon the exemption. *Hays v. Berry*, 104-455.

The lien attaches for the rent of the entire term, although it can only be enforced for the rent due, but as to the entire rent provided for by the lease the indebtedness is absolute, though not yet due. *Brown v. Cairns*, 107-727.

The fact that the landlord reserves the right to sell the entire premises, or a part thereof, with the condition that the rent shall be abated accordingly, does not prevent the entire rent being an indebtedness when the lease is entered into. *Ibid.*

The landlord has no right to the possession of the tenant's property under his lien until some part of the rent is actually due. *Hilman v. Brigham*, 90 N. W., 491.

The lien for rent under an occupancy at will resulting from possession after the termination of a written lease attaches only for the length of time necessary to end a tenancy by notice, and not for an entire year, although the tenant has been holding over for more than a year, and the landlord's lien in such case is therefore inferior to a chattel mortgage executed on the tenant's property after the termination of the written lease and prior to the accrual of the rent for which the landlord's lien is claimed. *German State Bank v. Herron*, 111-25.

The landlord having a lien on the tenant's property may sue for its conversion. *Church v. Bloom*, 111-319.

The landlord will not be estopped from asserting his lien as against a purchaser from the tenant by reason of having previously failed to object to similar sales during the existence of prior leases, at least without knowledge of such previous sales being brought home to him. *Ibid.*

The landlord may by his conduct estop himself from relying on his lien as against a purchaser from the tenant, but to constitute such estoppel it must appear that the purchaser has by payment, or other-

wise, put himself in such a position as to suffer damage or injury from the action of the landlord in attempting to enforce his lien. *Gardner v. Roach*, 111-413.

The individual property of one member of a firm, which property is used and kept on the leased premises, is not subject to a landlord's lien for rent due from the firm. The lien and the remedy given the landlord are purely statutory, and the landlord must avail himself of them just as they are given. *Ward v. Walker*, 111-611.

**Priority.** A purchaser from the tenant of property used on the premises during the term takes subject to the lien of the landlord and cannot claim protection as a purchaser without notice. *Hays v. Berry*, 104-455.

Where, in a proceeding to enforce a landlord's lien by attachment, employes of the tenant properly file their claims, under the provisions of Code § 4022, such claims take priority over the landlord's lien. *Stuart v. Twining*, 112-154.

Where exempt property covered by a chattel mortgage was left on the premises by the tenant at the end of his term, held, that the landlord acquired no lien thereon as against the mortgagee. *Bacon v. Carr*, 112-193.

A valid mortgage on personal property of a tenant, executed before the commencement of the term, creates a lien superior to that of the landlord. *Gasnick v. Steffensen*, 112-688.

Where a chattel mortgage on the property of the tenant is foreclosed, the landlord's lien may be satisfied out of the proceeds of the sale. *Downie v. Christen*, 88 N. W., 830.

Where machinery was sold to the tenant and set up on the premises under an agreement that a chattel mortgage should be executed for the purchase price when the machinery was so set up and accepted, held that such chattel mortgage took priority over the landlord's lien. *Davis Gasoline Engine Co. v. McHugh*, 88 N. W., 948.

**Waiver.** If the landlord takes a mortgage on the property as a security for rent and other indebtedness, he waives his statutory lien for rent, and will not be entitled to enforce such lien against the property in the hands of the tenant's trustee in bankruptcy. *In re Wolf*, 98 Fed. 74.

But the fact that there is a stipulation in the lease giving the landlord a lien in the nature of a mortgage upon exempt property of the tenant as security for the rent will not constitute a waiver of the statutory lien. *Ladner v. Balsley*, 103-674.

**SEC. 2993. Attachment.**

[For earlier annotations, see code, page 1052.—Ed.]

Where the landlord has several distinct causes of action against his tenant, only one of which is for rent, and he has blended his claims into one, he thereby waives the right to attachment. *Ladner v. Balsley*, 103-674.

While another action cannot be joined in a petition to enforce a landlord's lien for rent, yet where the tenant interposes a counter-claim, plaintiff may in reply set up other demands against the tenant which could not have been joined with the original cause of action. *Illstey v. Grayson*, 105-685.

One who takes a mortgage on chattel property which is subject to a landlord's lien may take possession of the property under his mortgage so long as the landlord has not proceeded to enforce his lien by attachment of the property, but such

attachment entitles the landlord to possession as against such mortgagee and he may under the attachment proceeding seize the property although the mortgagee has taken possession under the mortgage. *Brody v. Cohen*, 106-309.

An allegation that the sale of property by a tenant was fraudulent is immaterial, inasmuch as even a *bona fide* sale would not defeat the lien of the landlord's attachment. The landlord is not entitled to remedy by landlord's attachment as to property not subject to the landlord's lien. *Hillman v. Brigham*, 110-220.

Actual damages suffered by reason of the levy of a landlord's writ of attachment sued out when nothing is owing as rent, may be recovered as against the landlord suing out the attachment. *Sigler v. Murphy*, 107-128.

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**CHAPTER 10.**
**OF WALLS IN COMMON.****SECTION 2994. Resting wall on neighbor's land.**

[For earlier annotations, see code, pages 1052-3.—Ed.]

Where the entire party wall erected by one owner is covered by and contributes to the support of a building subsequently erected by the adjoining owner, the latter is bound to pay for his share of the wall erected by the former. *Monroe Lodge v. Albia State Bank*, 112-487.

Where the first owner builds his wall of the material and dimensions required

by the statute, and sufficient to carry his own and a similar building that may be erected by the adjoining proprietor, he is entitled to compensation for the share of the wall so erected, even though a cheaper wall would have been sufficient for the purpose of the adjoining owner. *Ibid.*

**SEC. 2995. Contribution by adjoining owner.**

It is one-half of the appraised value of the wall at the time the adjoining proprietor uses it that is to be charged to him, not its value to him, but its value as a common wall. Ordinarily such value is arrived at by ascertaining the reasonable

cost of the wall, and deducting for any depreciation that may have occurred before the same is used by the contiguous owner. *Monroe Lodge v. Albia State Bank*, 112-487.

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**CHAPTER 11.**
**OF EASEMENTS IN REAL ESTATE.****SECTION 3004. Adverse possession—use.**

[For earlier annotations, see code, pages 1055-6.—Ed.]

This section relates to titles by prescription, and not to those by dedication. *Hanger v. Des Moines*, 109-480.

The fact of adverse possession must be established by evidence distinct from and independent of the use of the easement, and it must also appear that the person against whom the claim is made had ex-

press notice thereof. *Friday v. Henah*, 113-425.

The provisions of this section are not applicable to cases where dedication is claimed, and the use of the property may be shown as indicating such dedication. *Dodge v. Hart*, 113-685.

## TITLE XV.

### OF TRADE AND COMMERCE.

#### CHAPTER 1.

##### OF WEIGHTS, MEASURES AND INSPECTION.

**SECTION 3016. Bushel by weight.** A bushel of the respective articles hereafter mentioned will mean the amount of weight in this section specified:

Wheat.....	sixty pounds;
Shelled corn.....	fifty-six pounds;
Corn in the cob.....	seventy pounds;
Rye.....	fifty-six pounds;
Oats.....	thirty-two pounds;
Barley.....	forty-eight pounds;
Potatoes.....	sixty pounds;
Beans.....	sixty pounds;
Bran.....	twenty pounds;
Clover seed.....	sixty pounds;
Timothy seed.....	forty-five pounds;
Flax seed.....	fifty-six pounds;
Hemp seed.....	forty-four pounds;
Buckwheat.....	fifty-two pounds;
Bluegrass seed.....	fourteen pounds;
Castor beans.....	forty-six pounds;
Dried peaches.....	thirty-three pounds;
Dried apples.....	twenty-four pounds;
Onions.....	fifty-seven pounds;
Salt.....	fifty pounds;
Stone coal.....	eighty pounds;
Charcoal.....	twenty pounds;
Coke.....	thirty-eight pounds;
Sweet potatoes.....	forty-six pounds;
Lime.....	eighty pounds;
Sand.....	one hundred and thirty pounds;
Hungarian grass seed.....	fifty pounds;
Millet seed.....	fifty pounds;
Osage orange seed.....	thirty-two pounds;
Sorghum saccharatum seed.....	thirty pounds;
Broom corn seed.....	thirty pounds;
Apples, peaches or quinces.....	forty-eight pounds;
Cherries, grapes, currants or gooseberries.....	forty pounds;
Strawberries, raspberries or blackberries.....	thirty-two pounds;

[18 G. A., ch. 21; 17 G. A., ch. 42; 16 G. A., chs. 52, 89; C. '73, § 2049; R., §§ 1778, 1781-4; C. '51, § 940.] [29 G. A., ch. 129, § 1.]

## CHAPTER 2.

## OF MONEY OF ACCOUNT AND INTEREST.

**SECTION 3038. Rate of interest.**

[For earlier annotations, see code, pages 1062-4.—Ed.]

A judgment may provide for interest on costs and attorneys' fees as well as on the principal sum for which the judgment is rendered. *Hoyt v. Beach*, 104-257.

In recovering judgment under a policy of accident insurance providing for the payment of a fixed sum in the event of a specified loss, and also a weekly indemnity during disability, held, that judgment should not include any allowance of interest on the amount which it should be found the company was liable to pay. *Hart v. National Masonic Acc. Assn.*, 105-717.

Where treble damages are allowed to be recovered by way of penalty they should not be increased by adding interest on the

amount of the recovery. *Blair v. Sioux City & P. R. Co.*, 109-369.

The receipt of a bank pass book, showing balance due, without objection to charges therein, amounts to an account stated. *Schoonover v. Osborne*, 108-453.

Interest does not accrue on a continuous open account without any settlement or balance being ascertained. *McFarland v. McCormick*, 114-368.

Where a claim is for unliquidated damages, interest may be taken into account as an element of damage in arriving at the sum which will be a just and lawful compensation for the injury sustained. *Christie v. Iowa Life Ins. Co.*, 111-177.

**SEC. 3040. Illegal rate prohibited.**

[For earlier annotations, see code, pages 1064-9 —Ed.]

Where the agent of the lender, under the authority of his principal, receives for the benefit of the principal commission in addition to the lawful rate of interest, the contract is usurious. *McNeely v. Ford*, 103-508.

Payment by the borrower of the necessary expenses of making the loan in addition to lawful interest will not constitute usury. *Iowa Sav. & L. Assn. v. Heidt*, 107-297.

Whether or not the contract is usurious does not depend upon the form the transaction is made to assume. Courts always

look beyond the mere form and search diligently for the substance and intent, and where the lender was to have the legal rate of interest for the money loaned, and in addition thereto one-half the discount which the borrower was able to secure on paying another debt by the use of the money borrowed, held that the contract was usurious. *Weaver v. Burnett*, 110-567.

Where renewal notes are given for the same debt, usury in the first or any intermediate note may be pleaded as against the last note. *Polk County Sav. Bank v. Harding*, 113-511.

**SEC. 3041. Usury—penalty.**

[For earlier annotations, see code, pages 1069-72.—Ed.]

The defense of usury is personal to the debtor and cannot be maintained by a stranger to the contract. *Pardoe v. Iowa State Nat. Bank*, 106-345.

Accordingly held that the right of action given against a national bank to recover usury paid and the penalty thereon (U. S. Rev. Stat. §§ 5197, 5198) was not available

except to a party who had personally or out of his own means paid usurious interest. *Ibid.*

Interest which has not been paid but only contracted for (covered for instance by notes not yet paid) cannot be recovered. *Talbot v. First Nat. Bank*, 106-361.

**SEC. 3042. Assignee.**

[For earlier annotations, see code, page 1072.—Ed.]

The assignee whose right is saved to plead usury under this section is one who takes in good faith and holds with no

knowledge of the taint. *Spinney v. Miller*, 114-210.

## CHAPTER 3.

## OF NOTES AND BILLS.

**SECTION 3044. Assignment of non-negotiable instruments.**

[For earlier annotations, see code, pages 1073-4 —Ed.]

The assignee gains no better rights by reason of the assignment than his assignor

had at the time the assignment was made. *Miller Brewing Co. v. Hansen*, 104-307.

**SEC. 3046. When assignment prohibited.**

[For earlier annotations, see code, page 1074.—Ed.]

This section does not apply where plaintiff is not in possession of the note on which suit is brought and the burden is upon him to show that it was transferred by the indorser while the owner thereof with intent to transfer title. *Moehn v. Moehn*, 105-710.

One who purchases a note and mortgage after maturity takes the same subject to all defenses or counter-claims of the mortgagor held against the mortgagee existing before notice of the transfer. While it is a general rule that the assignee of a mortgage securing paper overdue takes subject

to all equities between the original parties, this rule does not apply to latent equities of third parties. *Gibson v. McIntire*, 110-417.

A verbal assignment of a chose in action is valid. *Seymour v. Aultman*, 109-297.

A certificate of a mutual benefit association cannot be transferred to a creditor so as to give him a right to the benefit fund if it is expressly provided in the certificate that it shall be non-assignable. *Crocker v. Hogan*, 103-243.

Section applied. *Spinney v. Miller*, 114-210.

**SEC. 3049. Blank indorsement by one not a party.**

[For earlier annotations, see code, pages 1075-6.—Ed.]

A note bearing a blank endorsement by one not a party is notice to any one discounting it that the endorser is presumably an accommodation endorser, without con-

sideration, and hence a mere guarantor. This presumption can, however, be rebutted. *Lyon v. First Nat. Bank*, 85 Fed., 120.

**SEC. 3051. What entitled to grace.**

[For earlier annotations, see code, page 1076.—Ed.]

Under Code § 3051 grace was allowed only on negotiable paper. *Kilmer v. Gallagher*, 88 N. W., 959.

**SEC. 3053. Holidays.**

Sunday or any other day mentioned by this section as a holiday should not be excluded in estimating the three days

within which a motion for new trial is to be filed. *German Sav. Bank v. Cady*, 114-228.

**SEC. 3054. Notice of protest.**

[For earlier annotations, see code, page 1077 —Ed.]

Although the statute permits notice by mail to endorsers, the law requires presentment and demand in person, and letters written to the maker before the day

of maturity demanding payment will not constitute sufficient demand to hold an indorser. *Closz v. Miracle*, 103-198.

[Sections 3043, 3045, 3049, 3050, 3051, 3052, 3054 and 3055, of the code are repealed by section 3060-a, *infra*.—Ed.]

**SEC. 3060-a. Sections of code repealed.** The following enumerated sections of title fifteen (15) chapter three (3) of the code are hereby repealed: Sections three thousand and forty-three (3043), three thousand and forty-five (3045), three thousand and forty-nine (3049), three thousand and fifty (3050), three thousand and fifty-one (3051), three thousand and fifty-two (3052), three thousand and fifty-four (3054), and three thousand and fifty-five (3055). [29 G. A., ch. 130, § 197.]

**CHAPTER 3-A.****OF NEGOTIABLE INSTRUMENTS.****FORM AND INTERPRETATION.**

**SECTION 3060-a1. Form of negotiable instrument.** An instrument to be negotiable must conform to the following requirements:

1. It must be in writing and signed by the maker or drawer.

2. Must contain an unconditional promise or order to pay a sum certain in money.

3. Must be payable on demand or at a fixed or determinable future time.

4. Must be payable to the order of a specified person or to bearer; and,

5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty. [29 G. A., ch. 130, § 1.]

*Iowa:* A certificate of deposit, payable on a day certain in the future, is negotiable. *Bean v. Briggs*, 1-488; likewise municipal bonds, *Callahan v. Brown*, 31-333; *Clapp v. Cedar County*, 5-15; *Griffith v. Burden*, 35-133; but a land warrant is not, *Fort v. Wilson*, 3-153; nor a school order, *Nat. State Bk. v. Ind. Dist.*, 39-490; *Shepard v. Dist. Twp.*, 22-595; *Clark v. Des Moines*, 19-199.

(1) *Other states:* The writing may be in pencil. *Brown v. Butchers' Bank*, 6 Hill, 443.

(2) See section 3060-a3.

May designate particular kind of money, see section 3060-a6, subdivision 5. (Code section 3045 which permitted the instrument to be made payable in money or labor, is repealed.)

(3) As to when it is payable on demand, see section 3060-a7. When at a future time, see section 3060-a4.

(4) As to when it is payable to order, see section 3060-a8.

For additional citation of authorities, see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 20.

(5) See section 3060-a126.

**SEC. 3060-a2. Certainty as to sum—what constitutes.** The sum payable is a sum certain within the meaning of this act although it is to be paid:

1. With interest; or
2. By stated installments; or
3. By stated installments, with a provision that upon default in payment of any installment, the whole shall become due; or
4. With exchange, whether at a fixed rate or at the current rate; or
5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity. [29 G. A., ch. 130, § 2.]

(1) *Other states:* *Markey v. Corey*, 108 Mich., 184; *Wright v. Irwin*, 33 Mich., 32.

(2) *Iowa:* This changes the rule in Iowa. *Culbertson v. Nelson*, 93-187.

*Other states:* In support of the rule, adopted by the act see *Second Nat. Bk. v. Basuier*, 65 Fed., 58; *Hastings v. Thompson*, 54 Minn., 184; *Flagg v. School Dist.*, 4 N. D., 30.

(3) *Iowa:* See *Bank v. Marsh*, 89-273; *Sperry v. Horr*, 32-184. Amount is not rendered uncertain by stipulation that it may be reduced by showing overcharge. *Green v. Austin*, 7-521.

*Other states:* The rule adopted by the act is sustained by a great weight of authority outside of the decisions of this state. For some of them, supporting the rule, see *Bank v. Sutton Mfg. Co.*, 6 U. S. App., 312, 331; *Dorsey v. Wolff*, 142 Ill., 589; *Stoneman v. Pyle*, 35 Ind., 103; *Heard v. Dubuque Bk.*, 8 Neb., 10; *Stark v. Olson*, 44 Neb., 646.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 21.

**SEC. 3060-a3. When promise is unconditional.** An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with:

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or
2. A statement of the transaction which gives rise to the instrument. But an order or promise to pay out of a particular fund is unconditional. [29 G. A., ch. 130, § 3.]

(1) For authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 22.

(2) *Iowa:* Changes the rule in Iowa, *Charlton v. Reed*, 61-166; *Knepper v. Chase*, 7-145. See *Miller v. Poage*, 56-96.

*Other states:* In *Mott v. Havana Nat. Bk.*, 22 Hun., 354, it is held, that the clause "in part payment for a portable engine, which engine shall be and remain the property of the owner of this note, until the amount hereby secured is paid," did not destroy its

negotiable character. The same as to a note containing provision "given in consideration of a certain patent right." *Hereth v. Meyer*, 33 Ind., 511.

For additional citation of authorities, see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 22.

**SEC. 3060-a4. Determinable future time—what constitutes.** An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable:

1. At a fixed period after date or sight; or
2. On or before a fixed or determinable future time specified therein; or
3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect. [29 G. A., ch. 130, § 4.]

(2) *Other states:* See *Mattison v. Marks*, 31 Mich., 421; *Buchanan v. Wren (Tex.)*, 30 S. W., 1077; *Albertson v. Laughlin*, 173 Pa. St., 525.

(3) *Iowa:* A note is not negotiable if made to mature when convenient. *Works v. Hershey*, 35-340; or at the option of the maker. *Woodbury v. Roberts*, 58-348.

*Other states:* A note payable in a certain number of days after the death of the maker, or upon demand after the death of the maker is a good promissory note, because the event is sure to happen. *Carnwright v. Gray*, 127 N. Y., 92; *Hegeman v. Moon*, 131 N. Y., 462; *Shaw v. Camp*, 160 Ill., 425. But one payable when, or in a certain number of days after "A shall become of age," is not negotiable, because uncertain as to whether A will live so long. *Goss v. Nelson*, 1 Burr., 226. Likewise one payable when a certain ship shall arrive. *Coolidge v. Ruggles*, 15 Mass., 387.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 23

(4) *Iowa:* No time of payment being specified, it is presumptively payable on demand. *Bank v. Price*, 52-570.

**SEC. 3060-a5. Additional provisions not affecting negotiability.** An instrument which contains an order or promise to do an act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which:

1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or
2. Authorizes a confession of judgment if the instrument be not paid at maturity; or
3. Waives the benefit of any law intended for the advantage or protection of the obligor; or
4. Gives the holder an election to require something to be done in lieu of payment of money.

But nothing in this section shall validate any provision or stipulation otherwise illegal. [29 G. A., ch. 130, § 5.]

(1) *Iowa:* Coupling mortgage with a negotiable note, authorizing mortgagee to take possession of chattel but not to sell until after maturity of note, does not destroy negotiability. *Bank v. Taylor*, 67-572; distinguishing *Smith v. Martin*, 59-645, holding provision by which debt was liable to be diminished before maturity, destroyed negotiability.

*Other states:* A mere statement that collateral security has been deposited for the performance of the promise contained in the note does not affect its negotiability. *Wise v. Chariton*, 4 A. & E., 486; *Fancourt v. Thorne*, 9 Q. B., 312. And so with a provision authorizing sale of collateral if note be dishonored. *Perry v. Bigelow*, 128 Mass., 129; *Towne v. Rice*, 122 Mass., 67; *Biegler v. Merchants' L. & T. Co.*, 62 Ill. App., 560. The contrary is held as to this clause "given as collateral security with agreement." *Cos-tello v. Crowell*, 127 Mass., 293.

(2) *Iowa:* Provision authorizing attorney to confess judgment is illegal and no part of note, and therefore does not destroy negotiability. *Tolman v. Janson*, 106-455.

This provision meets the requirements of some of the states where judgment notes are in use.

For authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 24.

(3) *Other states:* This provision is designed to meet the practice in some states of inserting waiver of the benefits of homestead and exemption laws. See *Zimmerman v. Anderson*, 67 Pa. St., 421.

(4) *Other states*: If the obligation of the maker to pay in money is certain, the right of the holder to elect to take payment in something other than money will not destroy its negotiable character. *Hodges v. Shuler*, 22 N. Y., 114.

See notes Crawford's Annotated Neg. Inst. Law (2 Ed.), section 24.

**SEC. 3060-a6. Omissions — seal — particular money.** The validity and negotiable character of an instrument are not affected by the fact that:

1. It is not dated; or
2. Does not specify the value given, or that any value has been given therefor; or
3. Does not specify the place where it is drawn or the place where it is payable; or
4. Bears a seal; or
5. Designates a particular kind of current money in which payment is to be made.

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument. [29 G. A., ch. 130, § 6.]

(1) *Other states*: See section 3060-a36. True date may be shown by parol evidence between the immediate parties. *Bigge v. Piper*, 86 Tenn., 589.

(2) *Other states*: "Value received" not necessary. Daniel on Neg. Insts., section 108.

(3) See sections 3060-a3; 3060-a28; and 3060-a77.

(4) *Iowa*: See *Temple v. Hayes*, Morris, 9.

*Other states*: Corporate seal does not destroy negotiable character. *Chase Nat. Bk. v. Faurot*, 149 N. Y., 532; *Weeks v. Estler*, 143 N. Y., 374. Same as to municipal bonds. *Bank v. Village of Rome*, 19 N. Y., 20; *Mercer County v. Hackett*, 1 Wall, 83.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 25, note (d).

(5) *Iowa*: Note made payable in property destroys negotiability. *McCartney v. Smalley*, 11-85. So with one payable in currency. *Rindskoff v. Barrett*, 11-172; otherwise if shown that money was intended and so understood. *Haddock v. Wood*, 46-433; see *Culbertson v. Nelson*, 93-187.

*Other states*: A note made payable in gold coin is negotiable. *Chrysler v. Griswold*, 43 N. Y., 209. So one payable "in bank notes current in the City of New York." *Keith v. Jones*, 9 Johns, 120. One payable "in current funds at Pittsburg" held not negotiable. *Wright v. Hart's Admr.*, 44 Pa. St., 454.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 25, note (e).

[Note: Sec. 3045 of the Code is repealed by sec. 197 of the negotiable instruments act, Sec. 3060-a, *supra*.—Ed.]

**SEC. 3060-a7. When payable on demand.** An instrument is payable on demand:

1. Where it is expressed to be payable on demand, or at sight, or on presentation; or
2. In which no time for payment is expressed.

Where an instrument is issued, accepted or indorsed when overdue, it is, as regards the person so issuing, accepting or indorsing it, payable on demand. [29 G. A., ch. 130, § 7.]

(1) For the distinctions between instruments payable on demand and those payable at sight, see Daniel on Neg. Insts., sections 617 and 619, and authorities there cited. The act does away with these distinctions.

See notes to Crawford's Annotated Neg. Inst. Law (2 Ed.), Sec. 26, note (a).

(2) *Iowa*: A negotiable note transferred by indorsement after maturity is, as regards the person so issuing, accepting or indorsing, payable on demand and must be presented to all the makers in person, or at their usual places of residence or business within a reasonable time after transfer, and notice of non-payment immediately given to bind the indorser. *Graul v. Strutzel*, 53-712; *McKewer v. Kiriland*, 33-348; *Pryor v. Bowman*, 38-92; *Blake v. McMullen*, 33-150; *Bank v. Orvis*, 40-332; *Closz & Mickelson v. Miracle*, 103-198.

A draft or bill in which no time of payment is mentioned is, under the statutes, drawn payable on demand just as effectually as though the words "payable on demand" had been incorporated into it. *Bank v. Price*, 52-570.

*Other states:* As bearing on the text see *Messmore v. Morrison*, 172 Pa. St., 300; *James v. Brown*, 11 Ohio St., 601; *Libby v. Mekelborg*, 28 Minn., 38; *Roberts v. Snow*, 28 Neb., 425.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 26, note (b).

For other authorities relating to instruments issued, accepted or indorsed after maturity see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 26, note (c).

**SEC. 3060-a8. When payable to order.** The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order. It may be drawn payable to the order of:

1. A payee who is not maker, drawer or drawee; or
2. The drawer or maker; or
3. The drawee; or
4. Two or more payees jointly; or
5. One or some of several payees; or
6. The holder of an office for the time being.

Where the instrument is payable to order, the payee must be named or otherwise indicated therein with reasonable certainty. [29 G. A., ch. 130, § 8.]

*Other states:* The first clause of this section states the rule of the law merchant requiring the word order, or other word of similar import to render the instrument negotiable. *Smith v. Kendall*, 6 T. R., 123; *Carnwright v. Gray*, 127 N. Y., 92.

See Crawford's Annotated Neg. Inst. Law (2 Ed.), section 27, note (a).

(2) See section 3060-a184. A note payable to the order of the maker requires the maker's indorsement to complete the same.

(5) For illustrations see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 27, note (c).

(6) *Iowa:* A collateral agreement referred to in an indorsement and specified therein does not destroy negotiability. *Leland v. Parriott*, 35-454; the words "et al. or order" following name of payee destroy negotiability. *Gordon v. Anderson*, 83-224.

*Other states:* A note payable to certain persons as trustees of an incorporated association, or their successors in office, is negotiable. *Davis v. Gore*, 6 N. Y., 124. If the identity of the payee can be ascertained with certainty it is sufficient though not designated by name. *United States v. White*, 2 Hill, 59; *Blackman v. Lehman*, 63 Ala., 547.

**SEC. 3060-a9. When payable to bearer.** The instrument is payable to bearer:

1. When it is expressed to be so payable; or
2. When it is payable to a person named therein or bearer; or
3. When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or
4. When the name of the payee does not purport to be the name of any person; or
5. When the only or last indorsement is an indorsement in blank. [29 G. A., ch. 130, § 9.]

(2) *Iowa:* A note payable to "the bearer, M. C. Murdough," is not negotiable. *Warren v. Scott*, 32-22.

See section 3060-a30.

(3) For a discussion and a criticism of the authorities bearing upon this division of the section by Mr. Crawford, the author of the original negotiable instruments law, see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 28, note (b).

(4) *Other states:* A check payable to "cash" or to "sundries." *Willets v. Phoenix Bank*, 2 Duer, 121; *Mechanics' Bank v. Stratton*, 2 Keyes, 365.

**SEC. 3060-a10. Terms—when sufficient.** The negotiable instrument need not follow the language of this act, but any terms are sufficient which clearly indicate an intention to conform to the requirements thereof. [29 G. A., ch. 130, § 10.]

*Other states:* It is not necessary that the instrument be written in the English language but it may be in a foreign language. *Debebian v. Gala*, 64 Md., 262, 265; and may

be in pencil as well as ink. *Brown v. Butchers' Bank*, 6 Hill, 443. For rule governing construction of ambiguous instruments, see section 3060-a17.

**SEC. 3060-a11. Date—presumption as to.** When the instrument or an acceptance or any indorsement thereon is dated, such date is deemed *prima facie* to be the true date of the making, drawing, acceptance or indorsement, as the case may be. [29 G. A., ch. 130, § 11.]

*Other states:* Mistake in date may be shown between the immediate parties. *Cowing v. Altman*, 71 N. Y., 441. Where date is an impossible one, the law will adopt the nearest date. If dated Sept. 31, true date will be deemed to be Sept. 30. *Wagner v. Kenner*, 2 Rob. (La.), 120.

**SEC. 3060-a12. Ante-dated and post-dated.** The instrument is not invalid for the reason only that it is ante-dated or post-dated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery. [29 G. A., ch. 130, § 12.]

*Other states:* A post-dated bill or check may be negotiated before the day of its date. *Brewster v. McCardle*, 8 Wend., 478.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 31.

**SEC. 3060-a13. When date may be inserted.** When an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date. [29 G. A., ch. 130, § 13.]

*Other states:* See the following sections; also see *Redlich v. Doll*, 54 N. Y., 238.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 32, note (b).

**SEC. 3060-a14. Blanks—when may be filled.** Where the instrument is wanting in any material particular, the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a *prima facie* authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time. [29 G. A., ch. 130, § 14.]

*Other states:* The leading authority upon the right of a person in possession to fill blanks when necessary to complete the instrument in a material particular is *Russell v. Langstaffe*, 2 Doug., 514. See *Androscoggin Bank v. Kimball*, 10 Cush., 373. If blank space is left for name of payee holder may fill with his own name. *Boyd v. McCann*, 19 Md., 118. The authority to complete the instrument, however, will not authorize the insertion of matter not essential to its completeness. *Weyerhauser v. Dunn*, 100 N. Y., 150.

The rule contained in the second clause of the section operates only where the instrument has been *delivered*; see the following section. As to rights of bona fide holder for value of such an instrument filled up contrary to agreement, see *Redlich v. Doll*, 54 N. Y., 234, 238.

For other authorities and a discussion of the rules adopted by this section, see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 33, notes (a), (b) and (c).

**SEC. 3060-a15. Incomplete instrument not delivered.** Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery. [29 G. A., ch. 130, § 15.]

*Iowa:* Delivery to payee by third party without authority is not binding. *Ware v. Smith*, 62-159; but delivery by third party in violation of agreement is not a defense as against an innocent purchaser. *Graff v. Logue*, 61-704.

*Other states:* The instrument must be complete and perfect when issued, or else authority reposed in some one to supply the part required to complete it afterwards. *Sedgwick v. McKim*, 53 N. Y., 307, 313; *Davis Sewing Mach. Co. v. Best*, 105, N. Y., 59-67.

For other authorities, see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 34.

**SEC. 3060-a16. Delivery—when effectual—when presumed.** Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him, is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved. [29 G. A., ch. 130, § 16.]

*Iowa:* An alteration made after execution, before delivery without knowledge of surety, discharges surety from liability upon the note. *Marsh v. Griffin*, 42-403.

*Other states:* Delivery according to the purpose and intent of the parties is essential to its existence. *Burson v. Huntington*, 21 Mich., 416.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 35, notes (c) and (d).

**SEC. 3060-a17. Construction where instrument is ambiguous.** Where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply:

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, references may be had to the figures to fix the amount.

2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof.

3. Where the instrument is not dated, it will be considered to be dated as of the time it was issued.

4. Where there is conflict between the written and printed provisions of the instrument, the written provisions prevail.

5. Where the instrument is so ambiguous that there is doubt whether it is a bill or a note, the holder may treat it as either, at his election.

6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser.

7. Where an instrument containing the words "I promise to pay," is signed by two or more persons, they are deemed to be jointly and severally liable thereon. [29 G. A., ch. 130, § 17.]

(1) *Iowa:* No recovery at law can be had on a note which fails to state, in the body of it, the amount for which it is given. Marginal figures are no part of it, but a mere memorandum. *Hollen v. Davis*, 59-444.

*Other states:* Marginal figures are regarded as mere memoranda and no part of the instrument, *Smith v. Smith*, 1 R. I., 388.

(3) *Other states:* *Knisley v. Sampson*, 100 Ill., 54.

(4) *Other states:* But this rule does not permit of the rejection of any of the printed matter which, by any reasonable construction, may be reconciled with the written part. *Miller v. Hannibal & St. J. R. R. Co.*, 90 N. Y., 430.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 36, note (c).

(5) *Other states:* *Heise v. Bumpass*, 40 Ark., 547.

For illustrations and other authorities, see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 36, note (d).

(6) For rule as to irregular indorsers, see section 3060-a64.

(7) *Other states:* *Monson v. Drakeley*, 40 Conn., 559; *Dart v. Sherwood*, 7 Wis., 523.

**SEC. 3060-a18. Liability of person signing in trade or assumed name.** No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name. [29 G. A., ch. 130, § 18.]

*Other states:* Presumption is that party takes instrument on the credit of the parties whose names appear thereon. *Briggs v. Partridge*, 64 N. Y., 363. A person may become a party to a bill or note by any mark or designation he chooses to adopt; provided it be used as a substitute for his name and he intends to be bound by it. *DeWitt v. Walton*, 9 N. Y., 574. See Crawford's Annotated Neg. Inst. Law (2 Ed.), section 37, where other authorities are cited.

**SEC. 3060-a19. Signature by agent—authority—how shown.** The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency. [29 G. A., ch. 130, § 19.]

See *Conroe v. Case*, 74 Wis., 85. As to ratification of unauthorized signature see *Bartlett v. Tucker*, 104, Mass., 336; *Paul v. Berry*, 78 Ill., 158; *Bank v. Marine Bank*, 16 Wis., 120.

**SEC. 3060-a20. Liability of person signing as agent, etc.** Where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of the principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character without disclosing his principal, does not exempt him from personal liability. [29 G. A., ch. 130, § 20.]

*Iowa:* For the rule in Iowa in cases where the makers attempt to sign in representative capacity, merely adding, however, after their own signature, the words "President," "Secretary," "Trustee," etc., see the following cases: *Wing v. Glück*, 4-73; *Am. Ins. Co. v. Stratton*, 59-697; *Scraper Co. v. Tuttle*, 61-423; *Lewis v. Tilton*, 64-220; *Hefner v. Brownell*, 70-591; *McCandless v. Belle Plaine Canning Co.*, 78-162; *Lee v. Percival*, 85-639; *Matthews v. Dubuque Mattress Co.*, 87-246; *Day v. Ramsdell*, 90-731; *Savings Bank & Trust Co. v. Swan*, 100-718.

*Other states:* But if the principal is plainly disclosed in the body of the instrument, one signing in a representative capacity, or as agent, is not personally liable. *Whitney v. Inhabitants of Stow*, 11 Mass., 368; *Haskell v. Cornish*, 13 Cal., 45; *Little v. Bailey*, 87 Ill., 239. And this would seem to be the rule adopted by this section of the act.

See Crawford's Annotated Neg. Inst. Law (2 Ed.), section 39 and notes thereto. See also Neg. Insts. Law, by Selover, section 24, and authorities cited.

Mr. Crawford, the author of the original draft of the act, in a note to section 39 of his work says:

"In the original draft submitted to the Conference of Commissioners on Uniformity of Laws this section read as follows: 'Where a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument; but the mere addition of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability. In determining whether a signature is that of the principal or of the agent by whose hand it is written, that construction is to be adopted which is most favorable to

the validity of the instrument.' This is the English rule, and was the rule in New York prior to the statute. Under that rule a person signing for or on behalf of a principal was not liable *on the instrument*, notwithstanding he had no authority to bind his principal. There was an implied warranty on his part that he possessed such authority, and if he did not he became liable upon such warranty for the damages resulting from the breach. *Miller v. Reynolds*, 92 Hun, 400. But no action could be maintained against him on the instrument when by its terms it did not purport to bind him. And his liability upon the implied warranty did not accompany the transfer of the instrument, unless the claim founded upon the warranty was also assigned to the person to whom the instrument was transferred. (Id.) The effect of the section, as it now stands, is to permit the holder to sue the agent on the instrument, if he was not duly authorized to sign the same on behalf of the principal."

**SEC. 3060-a21. Signature by "procurator"—effect of.** A signature by "procurator" operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority. [29 G. A., ch. 130, § 21.]

See notes to section 40, Crawford's Annotated Neg. Inst. Law (2 Ed.).

**SEC. 3060-a22. Effect of indorsement by infant or corporation.** The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon. [29 G. A., ch. 130, § 22.]

For authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 41, notes (a) and (b).

**SEC. 3060-a23. Forged signature—effect of.** Where a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority. [29 G. A., ch. 130, § 23.]

*Other states:* *Buckley v. Sec. Nat. Bk. of Jersey City*, 35 N. J. Law, 400; *Whiteford v. Munroe*, 17 Md., 135.

In the absence of an estoppel or of an adoption or ratification of the signature, no rights can be acquired by a bona fide or other holder under a forged signature, against the person whose name is forged. *Mersman v. Werges*, 3 Fed., 378; *Butler v. Carns*, 37 Wis., 61; *Bank v. Adams*, 91 Ind., 280; *Bank v. Crafts*, 4 Allen, 447; *Wellington v. Jackson*, 121 Mass., 157.

See also Crawford's Annotated Neg. Inst. Law (2 Ed.), section 42, note (b).

#### CONSIDERATION OF NEGOTIABLE INSTRUMENTS.

**SEC. 3060-a24. Presumption of consideration.** Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value. [29 G. A., ch. 130, § 24.]

*Iowa:* A blank indorsement by person not the payee or indorsee thereof imports a sufficient consideration to sustain his contract of guaranty. *Veach v. Thompson*, 15-380.

See Code section 3069. *Jones v. Berryhill*, 25-289; *Bank v. Hurford & Bro.*, 29-579.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 50, note (a).

See also Neg. Inst. Law by Selover, sections 87, 117, 145, 150 and 179, and authorities there cited.

**SEC. 3060-a25. Consideration—what constitutes.** Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value, and is deemed such, whether the instrument is payable on demand or at a future time. [29 G. A., ch. 130, § 25.]

*Iowa:* An antecedent indebtedness is a sufficient consideration and a *bona fide* holder for value before maturity, of such a note is protected against latent equities. *Robinson v. Lair*, 31-9.

*Other states:* *Railroad Co. v. Nat. Bank*, 102 U. S., 14; *Swift v. Tyson*, 16 Pet., 1. These cases support the rule that a bona fide holder taking a negotiable instrument in payment of, or as security for an antecedent debt, is a holder for a valuable consideration, entitled to protection against all the equities between the antecedent parties. See also *Bank v. Morse*, 163 Mass., 381; *Roberts v. Hall*, 37 Conn., 205; *Harold v. Kays*, 64 Mich., 439; *Spencer v. Sloan*, 108 Ind., 183.

For other authorities and a discussion of the rule adopted by the act, giving the states in which the rule is changed, see notes to section 51 of Crawford's Annotated Neg. Inst. Law (2 Ed.),

**SEC. 3060-a26. What constitutes holder for value.** Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time. [29 G. A., ch. 130, § 26.]

In a note to the section of the New York act, the author of the act says: "If a party be a *bona fide* holder for value of a bill before its acceptance, it is not essential to his right to enforce it against a subsequent acceptor, that an additional consideration should proceed from him to the drawee. The bill itself implies a representation by the drawer that the drawee is already in receipt of funds to pay, and his contract is that the drawee shall accept and pay according to the terms of the draft. The drawee can, of course, upon presentment, refuse to accept, and in that event, the only recourse of the holder is against the prior parties thereto; but in case the drawee does accept the bill, he becomes primarily liable for its payment, not only to the indorsees, but also to the drawer himself." Citing *Heuertemattie v. Morris*, 101 N. Y., 70.

**SEC. 3060-a27. When lien on instrument constitutes holder for value.** Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien. [29 G. A., ch. 130, § 27.]

*Other states:* *Continental Nat. Bk. v. Bell*, 125 N. Y., 38, 42; *Rogers v. Squires*, 98 N. Y., 49.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 53.

**SEC. 3060-a28. Effect of want of consideration.** Absence of\* failure of consideration is matter of defense as against any person not a holder in due course, and partial failure of consideration is a defense *pro tanto*, whether the failure is an ascertained and liquidated amount or otherwise. [29 G. A., ch. 130, § 28.]

*Other states:* While the note itself is *prima facie* evidence of consideration, still as between the immediate parties, it is competent to show want or failure thereof. *Corlies v. Howe*, 11 Gray, 125; *Breneman v. Furniss*, 90 Pa. St., 186. But burden of proof is on party alleging. *Jennison v. Stafford*, 1 Cush., 168. Failure of consideration does not affect the negotiability of the instrument. *Dingman v. Amsink*, 77 Pa. St., 114. The defense of want of consideration is governed by the *lex loci*. *Herdic v. Roessler*, 109 N. Y., 127, 133, 134. As to the matter of defense for partial failure of consideration, see *Black v. Rigway*, 131 Mass., 80.

See Daniel on Neg. Insts. Section 210.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 54, notes (a), (b) and (c).

As to when one is a holder in due course, see sections 3060-a26 to 3060-a29.

**SEC. 3060-a29. Liability of accommodation party.** An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party. [29 G. A., ch. 130, § 29.]

*Other states:* The maker of an accommodation note lends his credit without instructions as to the manner of its use. *Lenheim v. Wilmarding*, 55 Pa. St., 73. He cannot

[\*The New York act contains the word "or" in place of the word "of."—Ed ]

set up want of consideration. *Carpenter v. Bank*, 106 Pa. St., 170-172. In respect to third persons, he is held to the character which he has assumed. *Stephen v. Bank*, 88 Pa. St., 157, 162-63. A mutual exchange of notes will not make them accommodation notes. *Rice v. Grange*, 131 N. Y., 149; *Woman v. Frost*, 52 N. Y., 422. But he may retract his indorsement, if he is an accommodation indorser at any time before the paper is negotiated. *Berkeley v. Tinsley*, 88 Va., 1001, 1004. The provision of the statute probably does not apply to corporations, which as a general rule are without power to bind themselves as accommodation parties. *Bank v. Atkinson*, 55 Fed., 465; *Bank v. Bank*, 13 N. Y., 309; *Bank v. Globe Works*, 101 Mass., 57.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 55, notes (a) and (b).

## NEGOTIATION.

**SEC. 3060-a30. What constitutes negotiation.** An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof if payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder, completed by delivery. [29 G. A., ch. 130, § 30.]

*Iowa:* A note made payable to bearer is negotiable by delivery and needs no indorsement. *Elliott v. Corbin*, 4-564; *Shelton v. Sherfey*, 3 G. Gr., 108. A note payable to J. S. or order, and endorsed by payee to S. T. or bearer, becomes, in the hands of subsequent holders, the same as a note payable to bearer. (Id.) A note payable to order can not be transferred by mere delivery, but should be endorsed by the payee or sued in his name, or the name of his legal representative. *Dawson v. Jewett*, 4 G. Gr., 157. (The rule announced last was changed by Sec. 3043 of the Code, but which section is now repealed.)

See *Pearson v. Cummings*, 28-344. A provision that a note is negotiable and payable at a certain place designated, does not affect its negotiability, nor prevent its negotiability elsewhere. *Schoharie Co. Bk. v. Bevard*, 51-257. Wrongful, unauthorized indorsement confers no rights upon transferee. *Thorpe Bros. & Co. v. Dickey*, 51-676.

As to what instruments are payable to bearer, see section 3060-a9. As to what instruments are payable to order, see section 3060-a8.

*Other states:* Indorsement is usually made by writing name on the back of the instrument but the place is not essential. *Haines v. Dubois*, 29 N. J. Law, 259. Indorsement alone without delivery conveys no title. *Dann v. Norris*, 24 Conn., 337; *Middleton v. Griffith*, 57 N. J. Law, 442.

For citation of other authorities, see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 60.

**SEC. 3060-a31. Indorsement—how made.** The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement. [29 G. A., ch. 130, § 31.]

*Iowa:* The assignee of a promissory note, under a transfer made in the body of a separate instrument, executed for an independent purpose, is not the holder of a legal title, discharged of prior equities, within the meaning of the law merchant. *Franklin v. Twogood*, 18-515. A holder of negotiable paper to be protected against equities existing between the original parties, must have acquired it by indorsement before maturity. A transfer, except by indorsement, even before maturity carries no such consequences. *Grimm v. Warner et al.*, 45-106. The prevailing rule in this state is, that indorsements of negotiable paper shall be made thereon under the hand of the indorser. *Bettis v. Bristol*, 56-41. An assignee, as distinguished from an indorsee, acquires no greater rights than the assignor had. *Johnson v. Walker et al.*, 60-315.

*Other states:* *Crosby v. Roub*, 16 Wis., 616; *Folger v. Chase*, 18 Pick., 63; *French v. Turner*, 15 Ind., 59.

For citation of other authorities, see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 61, notes (a) and (b).

**SEC. 3060-a32. Indorsement must be of entire instrument.** The indorsement must be an indorsement of the entire instrument. An indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where

the instrument has been paid in part, it may be indorsed as to the residue. [29 G. A., ch. 130, § 32.]

*Iowa*: Prior to the act, an assignee of a note might sue in his own name, although only part of the amount was assigned to him. *Cochran v. Glover*, Morris, 151.

*Other states*: *Lindsay v. Price*, 33 Tex., 282. Indorsement of a partial payment on the instrument does not render it non-negotiable. *Smith v. Shippey*, 182 Pa. St., 24.

**SEC. 3060-a33. Kinds of indorsement.** An indorsement may be either in blank or special; and it may also be either restrictive or qualified, or conditional. [29 G. A., ch. 130, § 33.]

*Other states*: As to what is a special indorsement, see *Rice v. Stearns*, 3 Mass., 225; *Reamer v. Bell*, 79 Pa. St., 292. A blank indorsement may be converted into a special or full indorsement by the holder. See sec. 3060-a35. As to what are restrictive indorsements, see *Power v. Finney*, 4 Call, 411; *White v. Nat. Bank*, 102 U. S., 658; *Hook v. Pratt*, 78 N. Y., 371.

**SEC. 3060-a34. Special indorsement—indorsement in blank.** A special indorsement specifies the person to whom or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery. [29 G. A., ch. 130, § 34.]

**SEC. 3060-a35. Blank indorsement—how changed to special indorsement.** The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement. [29 G. A., ch. 130, § 35.]

*Iowa*: The holder of a note indorsed in blank may fill up the blank indorsement to himself, and thus recover as indorsee thereunder. *Leland v. Parriott*, 35-454; it then becomes a contract duly signed by the indorser. *Bernard v. Barry*, 1 G. Gr., 388; but the indorser of a note in blank cannot be bound by a contract of guaranty written over his indorsement. *Belden v. Hann*, 61-42.

*Other states*: *Beckwith v. Angell*, 6 Conn., 317.

**SEC. 3060-a36. When indorsement restrictive.** An indorsement is restrictive which either:

1. Prohibits the further negotiation of the instrument; or
2. Constitutes the indorsee the agent of the indorser; or
3. Vests the title in the indorsee in trust for or to the use of some other person. But the mere absence of words implying power to negotiate does not make an indorsement restrictive. [29 G. A., ch. 130, § 36.]

*Other states*: *Commercial Nat. Bk. v. Armstrong*, 148 U. S., 50; *Nat. Butchers' & Drovers' Bk. v. Hubbell*, 117 N. Y., 384; *Freeman's Bk. v. National Tube Works*, 151 Mass., 413; *Commercial Nat. Bk. v. Hamilton Nat. Bk.*, 42 Fed., 880; *Bank of Metropolis v. First Nat. Bk. of Jersey City*, 19 Fed., 658.

For other authorities, see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 66.

**SEC. 3060-a37. Effect of restrictive indorsement—rights of indorsee.** A restrictive indorsement confers upon the indorsee the right:

1. To receive payment of the instrument.
2. To bring any action thereon that the indorser could bring.
3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement. [29 G. A., ch. 130, § 37.]

(2) *Other states*: The holder of negotiable paper may sue in his own name, though but an agent for others. *Ward v. Tyler*, 52 Pa. St., 393. The right of a bank to sue in its own name on paper indorsed to it "for collection" is sustained by *Wintermute v. Torrent*, 83 Mich., 555; *Regina Flour Mill Co. v. Holmes*, 156 Mass., 11; *Spofford v. Norton*, 126 Mass., 333. *Contra*, *Rock County Nat. Bk. v. Hollister*, 21 Minn., 385.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 67.

**SEC. 3060-a38. Qualified indorsement.** A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument. [29 G. A., ch. 130, § 38.]

*Iowa:* But an indorsement without recourse, as when transferred by delivery only, makes the transferrer liable upon implied warranty only to the extent, that the paper so transferred is genuine and not forged or fictitious; that it is of the kind or description which it purports to be; that the transferrer has done nothing and will do nothing to prevent its collection; that the parties to the instrument are *sui juris*, and capable of contracting; that it has not been paid, and that he has practiced no fraud upon the transferee in the matter of said transfer. *Watson v. Chesire*, 18-202; *Allen v. Pegram*, 16-163; *Miller v. Dugan*, 36-433; but such indorser is liable if he knew at the time of transfer that the note was worthless. *Brown v. Zachary*, 102-433.

*Other states:* An indorsement may be qualified by adding the words "without recourse" or similar words. *Grant v. Fleming*, 46 Pa. St., 140. A qualified indorsement, however, does not put the transferee on inquiry as to the equities between the original parties. *Bisbing v. Graham*, 14 Pa. St., 14.

See Crawford's Annotated Neg. Inst. Law (2 Ed.), section 68.

**SEC. 3060-a39. Conditional indorsement.** Where an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make payment to the indorsee or his transferee, whether the conditions have been fulfilled or not. But any person to whom an instrument so indorsed is negotiated, will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally. [29 G. A., ch. 130, § 39.]

For note discussing this section and authorities, see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 69.

**SEC. 3060-a40. Indorsement of instrument payable to bearer.** Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery, but the person indorsing specially is liable as indorser to only such holders as to\* make title through his indorsement. [29 G. A., ch. 130, § 40.]

See Daniel on Negotiable Instruments, sec. 663 a696.

**SEC. 3060-a41. Indorsement where payable to two or more persons.** Where an instrument is payable to the order of two or more payees or indorsers who are not partners, all must indorse unless the one indorsing has authority to indorse for the others. [29 G. A., ch. 130, § 41.]

*Other states:* *Ryhiner v. Feickert*, 92 Ill., 305. A partner may indorse for the firm. *Childress v. Emory*, 8 Wheat., 642.

**SEC. 3060-a42. Effect of instrument drawn or indorsed to a person as cashier.** Where an instrument is drawn or indorsed to a person, as "Cashier" or other fiscal officer of a bank or corporation, it is deemed *prima facie* to be payable to the bank or corporation of which he is such officer; and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer. [29 G. A., ch. 130, § 42.]

*Other states:* The rule stated in the text is supported by the following authorities. *Bank v. Muskingum Bank*, 29 N. Y., 619; *Bank v. Hall*, 44 N. Y., 395; *Folger v. Chase*, 18 Pick., 63. The extension of the rule to fiscal officers was deemed wise by the Commissioners. See statement of Mr. Crawford in his work, Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 72.

**SEC. 3060-a43. Indorsement where name is misspelled, et cetera.** Where the names† of a payee or indorsee is wrongly designated or misspelled,

\*[The New York act does not contain the word "to" which is superfluous.—Ed.]

†[This is as the word appears in the enrolled bill, although evidently an error. The word "name" appears in the New York act.—Ed.]

he may indorse the instrument as therein described adding, if he thinks fit, his proper signature. [29 G. A., ch. 130, § 43.]

*Other states:* Thus one who, while carrying on business on his own account in the name of a company, receives a note payable to the order of the company in the course of such business, may transfer the note by indorsing it in his own name. *Bryant v. Eastman*, 7 Cush., 111.

**SEC. 3060-a44. Indorsement in representative capacity.** Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability. [29 G. A., ch. 130, § 44.]

*Other states:* As to liability of executors and administrators, who accept or indorse, see *Schmittler v. Simon*, 101 N. Y., 554.

**SEC. 3060-a45. Time of indorsement.—presumption.** Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed *prima facie* to have been effected before the instrument was overdue. [29 G. A., ch. 130, § 45.]

*Other states:* *Mason v. Noonan*, 7 Wis., 609. See sec. 3060-a52. See also Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 75.

**SEC. 3060-a46. Place of indorsement—presumption.** Except where the contrary appears every indorsement is presumed *prima facie* to have been made at the place where the instrument is dated. [29 G. A., ch. 130, § 46.]

*Other states:* An indorsement in Massachusetts of a note executed and payable in New York, is a Massachusetts' contract and governed by the law of that state. *Glidden v. Chamberlain*, 167 Mass., 486.

See Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 76.

**SEC. 3060-a47. Continuation of negotiable character.** An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise. [29 G. A., ch. 130, § 47.]

*Other states:* The law is well settled that a note or bill negotiable in form, is negotiable as well after as before it becomes due. *Nat. Bk. v. Texas*, 20 Wall., 72; *French v. Jarvis*, 29 Conn., 347. But by indorsement after maturity, the instrument becomes, according to legal effect, payable on demand, so far as the indorser is concerned; and presentment for payment must be made within a reasonable time, and due notice of dishonor given the indorser. *Berry v. Robinson*, 9 Johns., 121; *Van Hoosen v. Van Alstyne*, 3 Wend., 79; *Patterson v. Todd*, 18 Pa. St., 426.

Other authorities are cited in Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 77. See sections 3060-a119 to 3060-a125.

**SEC. 3060-a48. Striking out indorsement.** The owner may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument. [29 G. A., ch. 130, § 48.]

*Iowa:* The holder of a negotiable note is presumed to have the beneficial interest in it and being the payee, may strike out any indorsement on it. *Gordon v. Pitt*, 3-385; the possession of a note by plaintiff, the payee thereof, is presumed to be rightful, and the erasure of an indorsement thereon will be deemed to have been made by due authority. *Goddard v. Cunningham*, 6-400; to the same effect. *Palmer v. State Bank*, 19-112. See also 15-380.

*Other states:* The holder may strike out all intervening indorsements, and aver that the first blank indorser indorsed immediately to himself. Byles on Bills, 149: *Preston v. Mann*, 25 Conn., 127. This may be done at the trial and after the plaintiff has finished his case. *Vanarsdale v. Hax*, 107 Fed., 878.

Other authorities are cited in Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 78.

**SEC. 3060-a49. Transfer without indorsement—effect of.** Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferee had herein, and the transferee acquires, in addition, the right to have the indorsement of the transferer. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made. [29 G. A., ch. 130, § 49.]

*Iowa:* A transferrer by delivery for value of a note impliedly warrants it to have received no material alteration prior to such transfer. *Snyder v. Reno*, 38-329; see *Miller v. Dugan*, 36-433.

*Other states:* See *Simpson v. Hall*, 47 Conn., 417; *Bank v. Bingham*, 118 N. Y., 349. See note to Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 79.

**SEC. 3060-a50. When prior party may negotiate instrument.** Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the same, but he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable. [29 G. A., ch. 130, § 50.]

*Iowa:* The signer of a note as security, who subsequently takes it up may reissue the note as often as he takes it up. *Wilkerson v. Daniels*, 1 G. Gr., 180; an accommodation note, having once been discounted and taken up by accommodated party, does not become void, but may be transferred to a third party before maturity, discharged of equities existing between original parties, notwithstanding second indorser's knowledge of its character, and that it has once been indorsed and taken up. *Washington Bank v. Crum*, 15-53.

*Other states:* See *Scott v. First Nat. Bank*, 71 Ind., 445.

#### RIGHTS OF HOLDER.

**SEC. 3060-a51. Right of holder to sue—payment.** The holder of a negotiable instrument may sue thereon in his own name and payment to him in due course discharges the instrument. [29 G. A., ch. 130, § 51.]

*Other states:* This rule holds good even when restrictively indorsed. See section 3060-a37. Where plaintiff is the payee the production of the paper is sufficient. *Williams v. Holt*, 170 Mass., 351.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 90.

**SEC. 3060-a52. What constitutes a holder in due course.** A holder in due course is a holder who has taken the instrument under the following conditions:

1. That the instrument is complete and regular upon its face.
2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact.
3. That he took it in good faith and for value.
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it. [29 G. A., ch. 130, § 52.]

(1) *Other states:* To determine the character of an indorsee as a *bona fide* holder for value without notice, the point of time at which he parts with his money, is the important fact. If the paper was then on its face irregular—out of the usual course of business—the effect of that knowledge on the indorsee could not be prevented by subsequently putting it in a regular shape. *Losee v. Bissell*, 76 Pa. St., 459, 462.

As to incomplete instruments and authority to fill up blanks therein see section 3060-a14, *supra*.

(2) *Iowa:* A transfer by indorsement is presumed to have been for a valuable consideration and before maturity. *Rea v. Owens*, 37-262; An assignee of a note and mortgage who takes, without notice, subsequent to an agreement for extension, and subsequent to the original date of maturity, takes it "after due" in such sense that he acquires no right which his assignor, could not have claimed and enforced. *Duncan v. Finn*, 79-658.

*Other states:* *Marsh v. Marshall*, 53 Pa. St., 396. A promissory note matures when, by its terms, the principal becomes due; and one who purchases it in good faith, for value, before maturity, is within the protection of the law merchant, although interest is overdue at the time of such purchase. *Kelly v. Whitney*, 45 Wis., 110. But see *Hart v. Stickney*, 41 Wis., 630; *Newell v. Gregg*, 51 Barb., 253. But a note payable in installments is overdue when the first installment is overdue and unpaid, and one who takes it afterwards, takes it subject to all equities between the original parties. *Vinton v. King*, 4 Allen, 562. A transfer upon the day of maturity is before the instrument is overdue; for the principal debtor has the whole of that day in which to pay. *Continental Nat. Bank v. Townsend*, 87 N. Y., 8. But see *Sargent v. Southgate*, 5 Pick., 312; *Pine v. Smith*, 11 Gray, 38. A check deposited with a bank on the day of its date cannot be considered overdue when so deposited. *Bank v. Manson*, 168 Mass., 425.

(3) *Iowa:* A holder of a note as collateral security for an antecedent indebtedness, and with no extension of time, is not a holder for value. *Noteboom v. Watkins*, 103-580; neither is one a *bona fide* holder, who received it as further security for a pre-existing debt without giving any new consideration, or incurring any additional responsibility. *Bank v. Hall*, 106-540. See *Johnson v. Barney*, 1-531; *Stotts v. Byers*, 17-303. That a promissory note was obtained by fraud will not affect the right of a *bona fide* holder thereof, to whom it was indorsed before maturity, nor that such holder purchased it for a considerably less amount than its face. *Sully v. Goldsmith*, 32-397.

*Other states:* See *Steckel v. Steckel*, 28 Pa. St., 233, 235. As to what constitutes value, see section 3060-a25, *supra*.

(4) *Iowa:* A *bona fide* holder of a note made payable to a fictitious payee may recover of the maker. *Lane v. Krekle*, 22-399. One not a *bona fide* holder for value before maturity but merely holding for the payee and not in his own right, is not protected. *Bank v. McNulty*, 36-229; nor is an assignee in insolvency. *Roberts v. Corbin*, 26-315; and one who holds under a transfer made in the body of a separate instrument executed for an independent purpose is not the holder of a legal title discharged of prior equities, within the meaning of the law merchant. *Franklin v. Truegood*, 18-515. But the holder of a note under purchase at judicial sale and without notice is a *bona fide* purchaser. *Allison & Crane v. King*, 21-302.

*Other states:* As to what constitutes notice, see sec. 3060-a56, *infra*.

For other authorities under each of these propositions, see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 91.

**SEC. 3060-a53. When person not deemed holder in due course.** Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course. [29 G. A., ch. 130, § 53.]

*Other states:* As to what constitutes reasonable time, see section 3060-a193. No absolute measure can be fixed. A day or two. *Field v. Nickerson*, 13 Mass., 131, 137; seven days, *Thurston v. McKenn*, 6 Mass., 428; and even a month, *Ranger v. Corey*, 1 Metc., 369, is not too long; while eight months, *Bank v. Jenness*, 2 Metc., 288; *Ayres v. Hutchins*, 4 Mass., 370; three months and a half, *Stevens v. Brice*, 21 Pick., 193; and even two months and a half, *Losee v. Durkin*, 7 J. R., 70, have been deemed sufficient to discredit a note.

See Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 92.

**SEC. 3060-a54. Notice before full amount paid.** Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him. [29 G. A., ch. 130, § 54.]

*Other states:* *Dresser v. Missouri, etc., R. R. Construction Co.*, 93 U. S., 93.

**SEC. 3060-a55. When title defective.** The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud. [29 G. A., ch. 130, § 55.]

*Other states:* Commercial paper executed under duress is void, even though there may be some consideration to support it. *Magoon v. Reber*, 76 Wis., 392. The fraud in putting the paper in circulation must be a fraud against the defendant. *Kinney v. Kruse*, 28 Wis., 183.

For other authorities see note to Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 94.

**SEC. 3060-a56. What constitutes notice of defect.** To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith. [29 G. A., ch. 130, § 56.]

*Iowa:* Certain facts held not to constitute notice of infirmity. *Pond v. Agricultural Works*, 50-596; the rule stated to be that, the circumstances coming to the knowledge of the purchaser before the purchase must be such as to require that he shall in good faith, inquire as to the validity of the note, and it is only where the failure to inquire evinces actual bad faith, that such notice is sufficient. *Merrill v. Hole*, 85-66; *Cook v. Weirman*, 51-561; *Lake v. Reed*, 29-258. Circumstances and inference therefrom may be sufficient to charge purchaser with notice. *Trustees, etc., v. Hill*, 12-462; *Hoffman v. Leibfarth*, 51-711. See *Hawkins v. Wilson*, 71-762. Knowledge of the transferrer is not imputable or chargeable to the purchaser. *Stutzman v. Payne*, 23-17.

*Other states:* In a note to the corresponding section Mr. Crawford says, "The holder is not bound at his peril to be on the alert for circumstances which might possibly excite the suspicion of wary vigilance; he does not owe to the party who puts the paper afloat the duty of active inquiry in order to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence. The holder's rights cannot be defeated without proof of actual notice of the defect in title or bad faith on his part evidenced by the circumstances. Though he may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted *mala fide*, his title, according to settled doctrine, will prevail. *Cheever v. Pittsburgh, Shenango & Lake Erie R. R. Co.*, 159 N. Y., 59, 65; *American Exchange Nat. Bk. v. New York Belting, etc., Co.*, 148 N. Y., 705; *Knox v. Eden Musee Am. Co.*, 148 N. Y., 454; *Canajoharie Nat. Bk. v. Diefendorf*, 123 N. Y., 202; *Vosburgh v. Diefendorf*, 119 N. Y., 357; *Jarvis v. Manhattan Beach Co.*, 148 N. Y., 652; *Murray v. Lardner*, 2 Wall., 110; *Swift v. Smith*, 102 U. S., 442; *Belmont v. Hoge*, 35 N. Y., 65; *Welsh v. Sage*, 47 N. Y., 143; *Bank v. Young*, 41 N. J. Eq., 531; *Bank v. Bank*, 48 N. J. Law, 513; *Phelan v. Moss*, 67 Pa. St., 59; *Moorhead v. Gilmore*, 77 Pa. St., 118; *Bank v. Morgan*, 165 Pa. St., 199. While gross carelessness will not, as a matter of law, defeat title in purchaser for value, it may constitute evidence of bad faith. *Bank v. Diefendorf*, 123 N. Y., 191. The payment of value is a circumstance to be taken into account with other facts in determining the good faith of the purchaser, but it is not conclusive. *Cunningham v. Scott*, 90 Hun, 410, 411. The mere fact that the holder for value of a promissory note made by a third party receives it from a person engaged in the note brokerage business, as collateral security for a loan to such broker, is not sufficient to raise a doubt as to the authority of the broker to so deal with the note. *Bank v. New York Belting & Packing Co.*, 148 N. Y., 698. And a bank has a right to assume as to notes offered to it, whether for discount or as collateral security, by a customer who has an account with it, and who is in the habit of borrowing money from it, that the customer is acting in good faith, and within his lawful rights. (*Id.*)

"The fraudulent misappropriation by the broker of the proceeds of the discount is not sufficient to put the holder to the proof of his *bona fides*. *Sloan v. The Union Banking Co.*, 67 Pa. St., 470.

"One who receives the notes of a corporation from one of its officers in payment of, or as security for, a personal debt of such officer, does so at his peril. *Prima facie*, the act is unlawful, and, unless actually authorized, the purchaser will be deemed to have taken them with notice of the rights of the corporation. *Wilson v. Metropolitan Ry. Co.*, 120 N. Y., 145, 150. And where the maker of a note which is payable to his order and purports to be indorsed by a corporation, procures it to be discounted for his own benefit, this of itself, if unexplained, is notice that the indorsement is not made in the usual course of business, but is for the accommodation of the maker. *Bank v. German-Am. Mut. Warehousing & Security Co.*, 116 N. Y., 281."

**SEC. 3060-a57. Rights of holder in due course.** A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon. [29 G. A., ch. 130, § 57.]

*Iowa:* That defendants were accommodation makers is no defense to an action by an indorsee, though received by plaintiff with knowledge of that fact, if note was taken in good faith for value in the usual course of business. *Winters v. Home Ins. Co.*, 30-172; nor is the rule changed by the fact that it was negotiated by one of the makers, the real debtor instead of the payee. *Id.* In the absence of statutes permitting same, fraud cannot be set up against a note in the hands of an innocent purchaser. *Temple v. Hays & Hendershott*, Morris, 9; *Lake v. Reed*, 29-258; *Lehman v. Press*, 106-389; *Wright, Dryden & Co. v. Flynn*, 33-159. Duress not a defense against a *bona fide* holder for value. *Veach v. Thompson*, 15-380. Latent infirmities no defense against *bona fide* holder. *Gage v. Sharp*, 24-15. County bonds issued without authority are invalid in hands of purchaser. *Hull v. Argalls v. County of Marshall*, 12-142. Forgery, in its execution, renders paper invalid even in the hands of an innocent holder for value before maturity. *Caulicins v. Whisler*, 29-495; *First Nat. Bk. v. Zeins*, 93-140.

*Other states:* In a case construing this section of the Negotiable Instruments Law it has been held that under this law a *bona fide* holder may enforce a promissory note against the maker even though the note was given for a gambling debt, and that this statute has repealed the English statutes which were formerly in force in the District of Columbia. In the opinion, Alvey, C. J., says: "We know, moreover, that the great and leading object of the act, not only with congress, but also with the large number of the principal commercial states of the Union that have adopted it, has been to establish a uniform system of law to govern negotiable instruments wherever they might circulate or be negotiated. It was not only uniformity of rules and principles that was designed, but to embody in a codified form, as fully as possible, all the law upon the subject, to avoid conflict of decisions, and the effect of mere local laws and usages that have heretofore prevailed. The great object sought to be accomplished by the enactment of the statute, to free the negotiable instrument, as far as possible, from all latent or local infirmities that would otherwise inhere in it to the prejudice and disappointment of innocent holders as against all the parties to the instrument professedly bound thereby. This clearly could not be effected so long as the instrument was rendered absolutely null and void by local statutes, as against the original maker or acceptor, as is the case by the operation, indeed, by the express provision, of the statutes of Charles and Anne." *Wirt v. Stubblefield*, 17 App. Cas. D. C., 283.

See *Cromwell v. County of Sac*, 96 U. S., 60.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 96.

**SEC. 3060-a58. When subject to original defenses.** In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter. [29 G. A., ch. 130, § 58.]

Mr. Crawford says in a note to section 97 of his work: "It was not deemed expedient to make provision as to what equities the transferee will be subject to; for the matter may be affected by the statutes of the various states relating to set-off and counterclaim. In an act designed to be uniform in the various states, no more can be done than fix the rights of holders in due course. On the question whether only such equities may be asserted as attach to the bill, or whether equities arising out of collateral matters may also be asserted, the decisions are conflicting. In England it was decided in *Burroughs v. Moss*, 10 Barn. & Cress., 558, that the indorsee of an overdue bill is liable to such equities only as attach on the bill or note itself, and not to claims arising out of collateral matters, such as general set-off is. This is a leading case, and has since been uniformly followed in that country."

*Other states:* See also *Long v. Rhawn*, 75 Pa. St., 128; *Young v. Shriner*, 80 Pa. St., 463; *Robinson v. Lyman*, 10 Conn., 31. A person to whom the instrument is transferred as a gift, takes it subject to all the equities then existing between the original parties, but not subject to those which arise thereafter. *Bank v. Wood*, 128 N. Y., 35; *Baxter v. Little*, 6 Met., 7.

**SEC. 3060-a59. Who deemed holder in due course.** Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title. [29 G. A., ch. 130, § 59.]

*Other states:* The presumption is that the indorsee of negotiable paper receives it *bona fide* and for value. *Gray's Admr. v. Bank*, 29 Pa. St., 365. The holder may make out his title by presumption until it is impeached by evidence showing that the paper had a fraudulent or illegal inception. This being done, however, it devolves upon him to show the circumstances under which it came into his possession, and that he has acted in good faith. *Canajoharie Nat. Bk. v. Diefendorf*, 123 N. Y., 191; *Joy v. Diefendorf*, 130 N. Y., 6; *Sullivan v. Langley*, 120 Mass., 437; *Bank v. Iron Works*, 159 Mass., 158; *Hutchinson v. Boggs & Kirk*, 28 Pa. St., 294; and other authorities cited in Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 98.

## LIABILITIES OF PARTIES.

**SEC. 3060-a60. Liability of maker.** The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse. [29 G. A., ch. 130, § 60.]

*Other states:* The fact that the holder had other collateral securities for the same debt more than sufficient to cover it, from which, however, the debt had not been realized, is not a ground of defense on the part of the maker. *Lord v. Bank*, 20 Pa. St., 384.

**SEC. 3060-a61. Liability of drawer.** The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse, and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negating or limiting his own liability to the holder. [29 G. A., ch. 130, § 61.]

*Other states:* The transmission of a draft by mail by payee and its loss is not discovered for six months, discharges drawer. *Bank v. Farnsworth (N. D.)*, 72 N. W., 901. But a knowledge of the facts and a new promise to pay by drawer waives his right to a discharge. *Id.*

**SEC. 3060-a62. Liability of acceptor.** The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance, and admits:

1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and
2. The existence of the payee and his then capacity to indorse. [29 G. A., ch. 130, § 62.]

(1) *Other states:* The discounting of a bill by the drawee who has not accepted it is neither payment nor a promise to pay according to its tenor and effect, but puts him in the position of an indorsee for value with the right of action against drawer and indorser. *Swope v. Ross*, 40 Pa. St., 186; *Bank v. Bank*, 46 N. Y., 77; *Bank v. Bank*, 59 N. Y., 67; *Bank v. Bank*, 10 Wheat., 333.

Numerous other authorities are cited by Mr. Crawford in his work on the Negotiable Inst. Law (2 Ed.), sec. 112.

**SEC. 3060-a63. When person deemed indorser.** A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity. [29 G. A., ch. 130, § 63.]

See section 3060-a17, subdiv. 6, *supra*.

**SEC. 3060-a64. Liability of irregular indorser.** Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.

2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee. [29 G. A., ch. 130, § 64.]

*Other states:* This section is intended to cover irregular indorsements. The decisions upon this subject are very conflicting. In some jurisdictions the person placing his signature on the back of a note before the payee has indorsed, was deemed a joint maker. *Good v. Martin*, 95 U. S., 93. In other jurisdictions he was regarded as a guarantor and in still others an indorser.

For a discussion of the question and citation of additional authorities, see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 114.

**SEC. 3060-a65. Warranty where negotiation by delivery, et cetera.** Every person negotiating an instrument by delivery or by a qualified indorsement, warrants:

1. That the instrument is genuine and in all respects what it purports to be.

2. That he has a good title to it.

3. That all prior parties had capacity to contract.

4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee. The provisions of subdivision three of this section do not apply to persons negotiating public or corporate securities, other than bills and notes. [29 G. A., ch. 130, § 65.]

*Other states:* This, of course, refers only to the implied warranty. An express warranty may be so framed as to exclude all other warranties which would otherwise be implied by the law. *Giffert v. West*, 37 Wis., 115.

(1) *Other states:* *Littauer v. Goldman*, 72 N. Y., 506; *Herrick v. Whitney*, 15 Johns, 240; *Coolidge v. Brigham*, 5 Metc., 68; *McConeghy v. Kirk*, 68 Pa. St., 200; *Bank v. Caverly*, 7 Gray, 216, 220. See the following section.

As to implied warranty as to the identity of the thing sold, see *Meyer v. Richards*, 163 U. S., 385.

(2) *Other states:* *Meriden Nat. Bk. v. Gallaudet*, 120 N. Y., 298, 303.

(3) *Other states:* One who indorses a promissory note purporting to be executed by a firm, thereby impliedly contracts that the note was made by the firm in whose name it is executed, and he cannot dispute the fact in an action upon the indorsement. *Dalrymple v. Hillenbrand*, 62 N. Y., 5. And a second indorser cannot dispute the legal capacity of the payee to indorse on the ground that she was a married woman. *Bank v. Caverly*, 7 Gray, 216, 217. And one indorsing the note of a corporation admits its capacity to execute the note. *Glidden v. Chamberlin*, 167 Mass., 486.

(4) *Other states:* As to implied warranty that the note is unpaid, see *Daskman v. Ullman*, 74 Wis., 474. And an instrument void for usury transferred without indorsement or representation as to its legality, action cannot be sustained against the vendor without alleging and proving scienter. *Littauer v. Goldman*, 72 N. Y., 506; *Meyer v. Richards*, 163 U. S., 385.

*Otis v. Cullom*, 92 U. S., 448, is an action against the vendor of municipal bonds payable to bearer, afterward held void because the legislature had no power to pass the acts under which they were issued. It was held no recovery could be had in the absence of an express warranty.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 115.

**SEC. 3060-a66. Liability of general indorser.** Every indorser who indorses without qualification, warrants to all subsequent holders in due course:

1. The matters and things mentioned in subdivisions one, two and three of the next preceding section; and

2. That the instrument is at the time of his indorsement valid and subsisting. And, in addition, he engages that on due presentment, it shall be

accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. [29 G. A., ch. 130, § 66.]

(1) *Other states: United States v. American Exchange Nat. Bk.*, 70 Fed., 232.

(2) *Other states:* Parol evidence of an agreement which would vary the legal liability of the indorser under his indorsement is inadmissible. *Eaton v. McMahon*, 42 Wis., 484. And while there has been some conflict in the decisions, the sounder doctrine puts all indorsements on substantially the same footing. The contract by blank indorsement is fixed by law, and should not be rendered uncertain by parol, any more than when written out in full. *Charles v. Denis*, 42 Wis., 56, 58. This is the rule adopted in the statute, which makes the indorser's obligation absolute.

Other authorities are to be found in note to sec. 116, Crawford's Annotated Neg. Inst. Law (2 Ed.)

**SEC. 3060-a67. Liability of indorser where paper negotiable by delivery.** Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser. [29 G. A., ch. 130, § 67.]

*Other states:* The holder of paper payable to bearer and indorsed may sue upon it as bearer or indorsee at his election. Daniel on Neg. Insts., sec. 663a; 3 Kent's Comm., 44.

In some states a note payable to a designated payee or bearer cannot be negotiated except by the indorsement of such person. See *Garvin v. Wiswell*, 83 Ill., 218; *Blackman v. Lehman*, 63 Ala., 547.

**SEC. 3060-a68. Order in which indorsers are liable.** As respects one another, indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally. [29 G. A., ch. 130, § 68.]

*Other states:* This rule is general and applies to accommodation indorsers as well as to others. Such indorsements import, not a joint, but a several and successive liability, each indorser being responsible to all who succeed him. *Easterly v. Barber*, 66 N. Y., 433; *Kelley v. Borroughs*, 102 N. Y., 93; *McCarty v. Roots*, 21 How. (U. S.), 432; *Shaw v. Knox*, 98 Mass., 214; *Howe v. Merrill*, 15 Cush., 88; *Russ v. Sadler*, 197 Pa. St., 51.

See Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 118.

**SEC. 3060-a69. Liability of agent or broker.** Where a broker or other agent negotiates an instrument without indorsement, he incurs all the liabilities prescribed by section sixty-five of this act, unless he discloses the name of his principal, and the fact that he is acting only as agent. [29 G. A., ch. 130, § 69.]

*Other states: Meriden Nat. Bk. v. Gallaudet*, 120 N. Y., 289; *Cabot Bk. v. Morton*, 4 Gray, 156; *Worthington v. Cowles*, 12 Mass., 30.

#### PRESENTMENT FOR PAYMENT.

**SEC. 3060-a70. Effect of want of demand on principal debtor.** Presentment for payment is not necessary in order to charge the person primarily on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But, except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers. [29 G. A., ch. 130, § 70.]

*Iowa:* The failure of the plaintiff to demand payment at the specified place will not excuse the defendant or maker from providing for its payment. *Myers v. Byington*, 34-205; *Games v. Manning*, 2 G. Gr., 251; *Barker v. Brink*, 4 G. Gr., 59. To charge an indorser presentment, demand and notice must be given and shown by affirmative proof.

*Bank of Red Oak v. Orvis*, 40-332. If there are joint makers, presentment and demand must be made upon all. *Id.* In absence of notice of dishonor, the institution of suit against makers is not sufficient to charge indorser. *Keater & Skinner v. Hock, Musser & Co.*, 11-536. In case of transfer after maturity, demand and notice must be given within reasonable time to charge indorser. *Jones v. Middleton*, 29-188; *Pryor v. Bowman*, 38-92.

*Other states:* As to there being no necessity for presentment to charge person primarily liable, see *Howard v. Boorman*, 17 Wis., 459; *Hills v. Place*, 48 N. Y., 520.

The rule adopted generally in the United States is that where a note is made payable at a particular bank or other place, or a bill of exchange is drawn or accepted payable in like manner, it is not necessary in order to recover of the maker or acceptor to aver or prove presentment or demand of payment at such place on the day the instrument became due or afterward. The only consequence of a failure to make such presentment is that the maker or acceptor, if he was ready at the time and place to make the payment, may plead the matter in bar of damages and costs. *Parker v. Stroud*, 98 N. Y., 379, 384; *Cox v. Nat. Bk.*, 100 U. S., 713.

A draft drawn in another state, by one residing there, upon a party residing in this state, legal questions in reference to presentation and demand are to be determined by the laws of this state. *Sylvester v. Crohan*, 138 N. Y., 494; *Bank v. Lacombe*, 84 N. Y., 367.

**SEC. 3060-a71. Presentment where instrument is not payable on demand.** Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof. [29 G. A., ch. 130, § 71.]

*Iowa:* Protest and notice of dishonor given on the day following expiration of days of grace too late to charge indorser. *Barker & Griffith v. Webster & Wells*, 10-593. A presentment for payment before the last day of grace is premature, the note not being due until then. *Edgar v. Greer*, 8-394.

As to date of maturity, see sec. 3060-a85.

For citation of authorities under this section, see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 131.

**SEC. 3060-a72. What constitutes a sufficient presentment.** Presentment for payment, to be sufficient, must be made:

1. By the holder, or by some person authorized to receive payment on his behalf.
2. At a reasonable hour on a business day.
3. At a proper place as herein defined.
4. To the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made. [29 G. A., ch. 130, § 72.]

(1) *Iowa:* Agent under parole authority may make demand. *Bank v. McLeran et al.*, 26-306.

*Other states:* As to when possession of a negotiable instrument is sufficient evidence of a right to present and demand payment, see *Shedd v. Brett*, 1 Pick., 401. And payment to such person will always be valid unless he is known to the payer to have acquired possession wrongfully. Daniel on Neg. Insts., sec. 574.

(2) *Other states:* Except in cases where the instrument is payable at a bank, the holder has the whole day in which to present the same, the only limitation being that he must present it at a reasonable hour, and this may depend upon the circumstances of the case. *Bank v. Burton*, 58 N. Y., 430; *Farnsworth v. Allen*, 4 Gray, 453.

(3) See the following section.

(4) *Iowa:* Presentment for payment must be made to all the makers in person or at their usual places of residence or business. *Graul v. Strutzel*, 53-712; *Closz & Mickelson v. Miracle*, 103-198.

Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 132.

**SEC. 3060-a73. Place of presentment.** Presentment for payment is made at the proper place:

1. Where a place of payment is specified in the instrument and it is there presented.

2. Where no place of payment is specified and the address of the person to make payment is given in the instrument and it is there presented.

3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment.

4. In any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence. [29 G. A., ch. 130, § 73.]

(3) *Iowa*: A demand made at a maker's residence, if he has no place of business, when he is not at home, is sufficient. *Bank v. Orvis*, 42-691.

*Other states*: *Gates v. Beecher*, 60 N. Y., 518, 522. Presentment at the maker's usual place of business during business hours, there being no one there to answer, is a sufficient demand to charge the indorser. *Baumgardner v. Reeves*, 35 Pa. St., 250, *Wallace v. Crilly*, 46 Wis., 577. When addressed to the drawee at a particular house and accepted generally by him, see *Pierce v. Struthers*, 27 Pa. St., 249, 254; *Struthers v. Blake et al.*, 30 Pa. St., 139.

For other authorities, see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 133.

**SEC. 3060-a74. Instrument must be exhibited.** The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it. [29 G. A., ch. 130, § 74.]

*Iowa*: Presentment to the maker personally or at his place of permanent residence or business is necessary to charge an indorser. *Bank v. Green, Thomas & Co.*, 11-476.

*Other states*: *Ocean Nat. Bk. v. Fant*, 50 N. Y., 474, 476; *Musson v. Lake*, 4 How., 262; *Freeman v. Boynton*, 7 Mass., 483.

See Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 134.

**SEC. 3060-a75. Presentment where instrument payable at bank.** Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient. [29 G. A., ch. 130, § 75.]

*Other states*: *Salt Springs Nat. Bk. v. Burton*, 58 N. Y., 430; *Reed v. Wilson*, 41 N. J. Law, 29; *Shepard v. Chamberlain*, 8 Gray, 225. There seems to be a conflict of authorities as to the precise time as to when suit may be brought on a dishonored note payable at a bank. See *Church v. Clark*, 21 Pick., 309; *Blackman v. Nearing*, 43 Conn., 60; *Humphreys v. Sutcliffe*, 192 Pa. St., 336.

See Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 135.

**SEC. 3060-a76. Presentment where principal debtor is dead.** Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if with the exercise of reasonable diligence he can be found. [29 G. A., ch. 130, § 76.]

*Iowa*: In case of partners, after dissolution of the firm, see *Mt. Pleasant Branch of State Bk. v. McLeran*, 26-306.

*Other states*: But there must be competent and legal proof of his death. *Weems v. Farmers' Bk.*, 15 Md., 231.

**SEC. 3060-a77. Presentment to persons liable as partners.** Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm. [29 G. A., ch. 130, § 77.]

*Iowa*: In case of partners after dissolution of firm, see *Mt. Pleasant Branch of State Bank v. McLeran*, 26-306.

*Other states*: *Gates v. Beecher*, 60 N. Y., 518; *Bank v. Hunt*, 2 Hill, 635.

**SEC. 3060-a78. Presentment to joint debtors.** Where there are several persons, not partners, primarily liable on the instrument, and no

place of payment is specified, presentment must be made to them all. [29 G. A., ch. 130, § 78.]

*Iowa*: That presentment and demand must be made upon all the makers, see *Bank v. Orvis*, 40-332; *Graul v. Strutzel*, 53-712, *Closz v. Miracle*, 103-198.

*Other states*: *Gates v. Beecher*, 60 N. Y., 518; *Arnold v. Dresser*, 8 Allen, 435. In some cases this might be impracticable, but such cases are covered by section 3060-a82, *infra*.

**SEC. 3060-a79. When presentment not required to charge the drawer.** Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument. [29 G. A., ch. 130, § 79.]

*Iowa*: *Kimball v. Bryan*, 56-632.

*Other states*: Presentment is not dispensed with merely because the drawer has no funds in the hands of the drawee. *Life Ins. Co. v. Pendleton*, 112 U. S., 708; *Dickens v. Beal*, 10 Pet., 572.

**SEC. 3060-a80. When presentment not required to charge the indorser.** Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented. [29 G. A., ch. 130, § 80.]

**SEC. 3060-a81. When delay in making the presentment is excused.** Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence. [29 G. A., ch. 130, § 81.]

*Other states*: *Windham Bk. v. Norton*, 22 Conn., 213. In case of sickness of holder see *Wilson v. Senior*, 14 Wis., 380. If the facts are not disputed, the question of due diligence is one of law for the court; otherwise for the jury. *Belden v. Lamb*, 17 Conn., 451.

**SEC. 3060-a82. When presentment may be dispensed with.** Presentment for payment is dispensed with:

1. Where after the exercise of reasonable diligence presentment as required by this act cannot be made.
2. Where the drawee is a fictitious person.
3. By waiver of presentment, express or implied. [29 G. A., ch. 130, § 82.]

(1) *Iowa*: Demand of payment is unnecessary to charge indorser if the maker of the note has removed from the state before its maturity. *Whitely v. Allen*, 56-224. While the removal of the maker from the state dispenses with demand, notice of that fact and the fact of non-payment must still be given the indorser in order to charge him. *Leonard v. Olson*, 99-162. Mere insolvency of maker will not excuse demand on him in order to charge indorser. (Id.)

(3) *Iowa*: A promise to pay after maturity by an indorser with knowledge that note has not been presented and protested, will operate as a waiver of these requirements. *Hughes v. Bowen*, 15-446; *Campbell v. Varney*, 12-13; *Lomax v. Smyth & Co.*, 50-223. Certain facts considered and held not to be a waiver of demand. *Freeman v. O'Brien*, 38-406. Written promises to pay if maker does not made by indorser after maturity and with knowledge of protest for non-payment, amounts to waiver and renders him liable. *Davis v. Miller*, 88-114. An indorser in blank is bound, however, by waiver of presentation, protest and notice of non-payment contained in the body of the note, distinguishing. *Davis v. Miller*, *supra*.

*Other states*: Burden is on plaintiff to show due diligence. *Eaton v. McMahon*, 42 Wis., 484. It is the holder's duty to give the notary information as to the residence of the drawer or indorser. *Smith v. Fisher*, 24 Pa. St., 222. Presentment is not dispensed with by the insolvency of the maker or drawee. *Rienke v. Wright* (Wis.), 67 N. W., 737; *Bensonhurst v. Wilby*, 45 Ohio St., 340. As to when waiver may be made, see *Power v. Mitchell*, 7 Wis., 161. Waiver may result from implication and usage

or from any understanding between the parties which is of a character to satisfy the mind that a waiver is intended. *Cady v. Bradshaw*, 116 N. Y., 188, 191.

For a citation of other authorities, see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 142.

**SEC. 3060-a83. When instrument dishonored by non-payment.** The instrument is dishonored by non-payment when:

1. It is duly presented for payment and payment is refused or cannot be obtained; or

2. Presentment is excused and the instrument is overdue and unpaid. [29 G. A., ch. 130, § 83.]

**SEC. 3060-a84. Liability of person secondarily liable, when instrument is dishonored.** Subject to the provisions of this act, when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon, accrues to the holder. [29 G. A., ch. 130, § 84.]

*Other states:* The indorser's liability having been fixed by demand and notice of dishonor, he becomes an independent and principal debtor and does not stand in the capacity of a mere surety. *First Nat. Bk. v. Wood*, 71 N. Y., 405, 411.

Other authorities are cited in Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 144.

**SEC. 3060-a85. Time of maturity.** Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday, when that entire day is not a holiday. [29 G. A., ch. 130, § 85.]

The uniform negotiable instruments law generally abolishes days of grace, and sections 3050 and 3051 of the Code, relating to days of grace are repealed. Notwithstanding this, however, section 3060-a198 *infra*, provides that "a demand made on any one of the three days following the day of the maturity of the instrument," etc., as though grace might still be in force in this state.

**SEC. 3060-a86. Time—how computed.** Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment. [29 G. A., ch. 130, § 86.]

**SEC. 3060-a87. Rule where instrument payable at bank.** Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon. [29 G. A., ch. 130, § 87.]

*Other states:* There has been some conflict in the decisions as to the authority to pay a note or acceptance made payable there. The rule adopted in the statute is the one sustained by the weight of authority; and is also the rule which is most convenient in practice. It is supported by the following decisions: *Bank v. Bank*, 46 N. Y., 82; *Bank v. Hughes*, 17 Wend., 94; *Bank v. Henninger*, 100 Pa. St., 496; *Bedford Bk. v. Acoarn*, 125 Ind., 582.

The authorities holding the contrary are cited in Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 147.

**SEC. 3060-a88. What constitutes payment in due course.** Payment is made in due course when it is made at or after maturity of the instrument to the holder thereof in good faith and without notice that his title is defective. [29 G. A., ch. 130, § 88.]

*Other states:* Payment before the day of maturity is a defense which binds only the party receiving payment and those who stand in his shoes. *Watson v. Wyman*, 161 Mass., 96, 99.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 148.

#### NOTICE OF DISHONOR.

**SEC. 3060-a89. To whom notice of dishonor must be given.** Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged. [29 G. A., ch. 130, § 89.]

*Iowa:* Where there are several indorsers of a note, the holder may elect to hold any one or all of the prior indorsers. To hold all liable he must give all notice of protest; otherwise it is only necessary to give those whom he wishes to hold notice. Likewise an indorser thus notified, in order to charge his prior indorsers must, give them notice; but when an indorser receives notice of non-payment and protest either from a subsequent indorser, or from the holder of the note, it inures to the benefit of all subsequent indorsees. *Hamilton v. Veach*, 19-419.

*Other states:* That this rule does not apply to guarantors, see *Brown v. Curtiss*, 2 N. Y., 225; *Allen v. Rightmere*, 20 Johns., 365; *Robersts v. Hawkins*, 70 Mich., 566.

**SEC. 3060-a90. By whom given.** The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given. [29 G. A., ch. 130, § 90.]

*Iowa:* Notices of protest to several indorsers residing in the same town may be mailed to one, and will be sufficient to charge them all with notice, provided the party to whom they are sent shall again mail to the proper parties. *Van Brunt & Sons v. Vaughn*, 47-145. See *First Nat. Bk. v. Farneman*, 93-161.

*Other states:* That notice cannot be given by a stranger, see *Lawrence v. Miller*, 16 N. Y., 235, 237; *Chanoine v. Fowler*, 3 Wend., 173. A drawee who refuses acceptance cannot give notice. *Stanton v. Blossom*, 14 Mass., 115.

**SEC. 3060-a91. Notice given by agent.** Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not. [29 G. A., ch. 130, § 91.]

*Other states:* *Drexler v. McGlynn*, 99 Cal., 143. A notice made out by a notary public who signed by mistake the maker's name instead of his own, without authority of the maker, is insufficient. *Cabot Bk. v. Warner*, 92 Mass., 522. Banks as agents for collection, have authority to receive and transmit notices on behalf of the owners of the paper. *West River Bk. v. Taylor*, 34 N. Y., 128, 130; *Colt v. Noble*, 5 Mass., 167.

An agent in giving notice represents and acts on behalf of his principal, and this, though he may be a notary acting in his official character. *Lawrence v. Miller*, 16 N. Y., 235, 238.

**SEC. 3060-a92. Effect of notice given on behalf of holder.** Where notice is given by or on behalf of the holder, it inures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given. [29 G. A., ch. 130, § 92.]

*Other states:* A holder is not bound to give notice to any one but his immediate indorser. *West River Bank v. Taylor*, 34 N. Y., 128, 131; *Linn v. Horton*, 17 Wis., 150, 153.

**SEC. 3060-a93. Effect where notice is given by party entitled thereto.** Where notice is given by or on behalf of a party entitled to give notice, it inures for the benefit of the holder and all parties subsequent to the party to whom the notice is given. [29 G. A., ch. 130, § 93.]

**SEC. 3060-a94. When agent may give notice.** Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal.

If he gives notice to his principal, he must do so within the same time as if he were the holder, and the principal, upon receipt of such notice, has himself the same time for giving notice as if the agent had been an independent holder. [29 G. A., ch. 130, § 94.]

*Other states: Rosson v. Carroll*, 90 Tenn., 90.

**SEC. 3060-a95. When notice is sufficient.** A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate unless the party to whom the notice is given is in fact misled thereby. [29 G. A., ch. 130, § 95.]

*Other states: Kilgore v. Bulkley*, 14 Conn., 362; *Tobey v. Lenning*, 14 Pa. St., 483; *Aiken v. Marine Bk.*, 16 Wis., 679.

**SEC. 3060-a96. Form of notice.** The notice may be in writing or merely oral and may be given in any terms which sufficiently identify the instrument and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails. [29 G. A., ch. 130, § 96.]

*Iowa: Notice of non-payment may be verbal as well as in writing. First Nat. Bk. v. Ryerson*, 23-508. Certificate of notary which fails to show that the residences of the several parties were at the places where the notices were addressed to them, held sufficient. *Fuller & Warren v. Dingman*, 41-506. Certificate of protest considered and held sufficient. *Jones v. Berryhill*, 25-289.

*Other states: Brewster v. Arnold*, 1 Wis., 264. A notice which omits an essential feature of the note or misdescribes it, is an imperfect one, but not necessarily invalid. It is invalid only where it fails to give that particular information which it would have given but for its particular imperfection; and even in case the notice in itself be defective, if, from evidence *aliunde* of the attendant circumstances, it is apparent that the indorser was not deceived or misled as to the identity of the dishonored instrument, he will be charged. *Hodges v. Schuyler*, 22 N. Y., 114; *Artisans' Bk. v. Backus*, 36 N. Y., 106; *Gill v. Palmer*, 29 Conn., 57. To render the notice defective it must fail to convey sufficient knowledge to disclose the identity of the particular instrument dishonored. *Mills v. Bank of U. S.*, 11 Wheat., 431; *Bank of Alexandria v. Swaim*, 9 Pet., 35.

For numerous other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 167.

**SEC. 3060-a97. To whom notice may be given.** Notice of dishonor may be given either to the party himself or to his agent in that behalf. [29 G. A., ch. 130, § 97.]

*Other states: Fassin v. Hubbard*, 55 N. Y., 465, 471; *Bank v. Butler Colliery Co.*, 51 Hun, 63, 68.

**SEC. 3060-a98. Notice where party is dead.** Where any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence, he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased [29 G. A., ch. 130, § 98.]

*Other states: Shoenberger's Executor v. Lancaster Savings Institution*, 28 Pa. St., 459; *Massachusetts Bk. v. Oliver*, 10 Cush., 557; *Goodnow v. Warren*, 122 Mass., 82.

**SEC. 3060-a99. Notice to partners.** Where the parties to be notified are partners, notice to any one partner is notice to the firm, even though there has been a dissolution. [29 G. A., ch. 130, § 99.]

*Other states: Where partners give a promissory note with one of them as maker and the other as indorser, the latter is not liable on his indorsement unless he be duly notified of the dishonor of the note. Foland v. Boyd*, 23 Pa. St., 476; *Hubbard v. Matthews*, 54 N. Y., 43, 50.

**SEC. 3060-a100. Notice to persons jointly liable.** Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others. [29 G. A., ch. 130, § 100.]

*Other states:* *Shepard v. Hawley*, 1 Conn., 367; *Boyd v. Orton*, 16 Wis., 495.

For distinction between parties who are partners and joint parties who are not partners, see *Gates v. Beecher*, 60 N. Y., 518, 526.

**SEC. 3060-a101. Notice to bankrupt.** Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee. [29 G. A., ch. 130, § 101.]

*Other states:* Where the indorser had made a voluntary assignment for the benefit of creditors, notice to the assignee would bind the indorser and his estate. *Callahan v. Kentucky Bank*, 82 Ky., 231. To the same effect. *American Nat. Bk. v. Junk Bros.*, 94 Tenn., 634. *Contra, House v. Vinton*, 43 Ohio St., 346.

**SEC. 3060-a102. Time within which notice must be given.** Notice may be given as soon as the instrument is dishonored, and unless delay is excused as hereinafter provided, must be given within the times fixed by this act. [29 G. A., ch. 130, § 102.]

*Other states:* That the holder need not wait until the close of business hours but may send notice at once, see *Bank of Alexandria v. Swan*, 9 Pet., 33; *Lenox v. Roberts*, 2 Wheat., 373; *Whitwell v. Brigham*, 19 Pick., 117.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 173.

**SEC. 3060-a103. Where parties reside in same place.** Where the person giving and the person to receive notice reside in same place, notice must be given within the following times:

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following.
2. If given at his residence, it must be given before the usual hours of rest on the day following.
3. If sent by mail, it must be deposited in the post-office in time to reach him in the usual course on the day following. [29 G. A., ch. 130, § 103.]

*Other states:* *Adams v. Wright*, 14 Wis., 408; Daniel on Neg. Insts., sec. 1038; *Phelps v. Stocking*, 21 Neb., 444.

See also Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 174.

**SEC. 3060-a104. Where parties reside in different places.** Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

1. If sent by mail, it must be deposited in the post-office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter.
2. If given otherwise than through the post-office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post-office within the time specified in the last subdivision. [29 G. A., ch. 130, § 104.]

*Other states:* *Stephenson v. Dickson*, 24 Pa. St., 148; *Whitwell v. Johnson*, 17 Mass., 449. In *Smith v. Poillon*, 87 N. Y., 590, 597, it is said: "From a careful examination of all these authorities and many others it is clear that the law is not precisely settled. It appears that at first it was supposed to be necessary that notice of dishonor should be given by the next post after dishonor, on the same day if there was one. That rule was found inconveniently stringent, and then it was held that when the parties lived in different places between which there was a mail, the notice could be posted on the next day after the dishonor, or notice of dishonor. Some of them hold that when there are several mails on the next day, it is sufficient to send the notice by any post of that day. Other authorities lay down the rule, in general terms, that the notice must be posted by the first practical and convenient mail of the next day; and that rule seems to be

supported by the most authority in this state. What is a practical and convenient mail depends upon circumstances. It may be controlled by the usages of business and the customs of the people at the place of mailing, and the condition, situation and business engagements of the person required to give the notice. The rule should have a reasonable application in every case, and whether sufficient diligence has been used to mail the notice, the facts being undisputed, is a question of law."

See Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 175.

**SEC. 3060-a105. When sender deemed to have given due notice.** Where notice of dishonor is duly addressed and deposited in the post-office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails. [29 G. A., ch. 130, § 105.]

*Other states:* See *Windham Bk. v. Norton*, 22 Conn., 213; *Cook v. Foraker*, 193 Pa. St., 461.

**SEC. 3060-a106. Deposit in post-office—what constitutes.** Notice is deemed to have been deposited in the post-office when deposited in any branch post-office or in any letter box under the control of the post-office department. [29 G. A., ch. 130, § 106.]

*Other states:* See *Pearce v. Langft*, 101 Pa. St., 507; *Johnson v. Brown*, 154 Mass., 105.

**SEC. 3060-a107. Notice to subsequent party—time of.** Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor. [29 G. A., ch. 130, § 107.]

*Other states:* *Shelburne Falls Nat. Bk. v. Townley*, 102 Mass., 177; *Seaton v. Scovill*, 18 Kans., 435; *Linn v. Horton*, 17 Wis., 150.

**SEC. 3060-a108. Where notice must be sent.** Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he is\* not given such address, then the notice must be sent as follows:

1. Either to the post-office nearest to his place of residence, or to the postoffice where he is accustomed to receive his letters; or

2. If he lives in one place, and have his place of business in another, notice may be sent to either place; or

3. If he is sojourning in another place, notice may be sent to the place where he is sojourning. But where the notice is actually received by the party within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section. [29 G. A., ch. 130, § 108.]

*Other states:* That notice must be sent to the address given, see *Bartlett v. Robinson*, 39 N. Y., 187.

(1) *Iowa:* A notice of presentment, non-payment and protest to charge indorser, must be sent him at his proper post-office, and when sent to wrong post-office, held insufficient. *Northwestern Coal Co. v. Bowman & Co.*, 69-150; but where notice is addressed to indorser at his former post-office, but which had been discontinued and business transferred to another, held sufficient. *Bank v. Owen*, 23-185.

*Other states:* *Bank of Columbia v. Lawrence*, 1 Pet., 578; *Nat. Bk. v. Cade*, 73 Mich., 449.

(2) *Other states:* *Bank of U. S. v. Carneal*, 2 Pet., 549; *Bank v. Marsh*, 7 N. Y., 481.

For citation of other authorities see Crawford's Annotated Neg. Inst. Law, (2 Ed), sec. 179.

**SEC. 3060-a109. Waiver of notice.** Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be expressed or implied. [29 G. A., ch. 130, § 109.]

*Other states:* See *Ross v. Hurd*, 71 N. Y., 14, 18; *Low v. Howard*, 10 Cush., 159.

\*[The New York act contains the word "has" in place of the word "is."—Ed.]

But it must appear that the indorser had knowledge of the fact that the holder was in default. *Thornton v. Wynn*, 12 Wheat., 183; *Schierl v. Baumel*, 75 Wis., 75. And in Massachusetts it is held that knowledge on the part of the indorser, that demand upon the maker has not been made, is material, and must be proved, notwithstanding the fact that he knew that the note had not been paid and that notice of non-payment had not been given, and was aware that he was discharged from all liability. *Parks v. Smith*, 155 Mass., 26, 33.

For a citation of other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 180.

**SEC. 3060-a110. Whom affected by waiver.** Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only. [29 G. A., ch. 130, § 110.]

*Iowa:* A waiver of presentation, protest and notice of non-payment contained in the body of the note, is binding on one who indorses in blank. *Phillips v. Dippo*, 93-35; *Bank v. Sigstadt*, 96-491; *Bank v. Wilka*, 102-315.

*Other states:* *Lowry v. Steele*, 27 Ind., 168; *Bryant v. Taylor*, 19 Minn., 376. Where written above the signature, see *Woodman v. Thurston*, 8 Cush., 157.

**SEC. 3060-a111. Waiver of protest.** A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of a presentment and notice of dishonor. [29 G. A., ch. 130, § 111.]

*Other states:* *Anville Nat. Bk. v. Ketterring*, 106 Pa. St., 531; *Brewster v. Arnold*, 1 Wis., 264. In construing an allegation in a pleading that the instrument was duly protested, it will not be held to comprehend an averment that notice of dishonor was given to the indorser. *Cook v. Warren*, 88 N. Y., 37.

**SEC. 3060-a112. When notice is dispensed with.** Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged. [29 G. A., ch. 130, § 112.]

*Other states:* *Hobbs v. Straine*, 149 Mass., 212.

For citation of authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 183.

**SEC. 3060-a113. Delay in giving notice—how excused.** Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence. [29 G. A., ch. 130, § 113.]

*Other states:* *Martin v. Ingersoll*, 8 Pick., 1.

**SEC. 3060-a114. When notice need not be given to drawer.** Notice of dishonor is not required to be given to the drawer in either of the following cases:

1. Where the drawer and drawee are the same person.
2. Where the drawee is a fictitious person or a person not having capacity to contract.
3. Where the drawer is the person to whom the instrument is presented for payment.
4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument.
5. Where the drawer has countermanded payment. [29 G. A., ch. 130, § 114.]

(1) *Other states:* Where all members of the firm are members of the house which drew the bill, notice is not required to render the firm liable. *West Branch Bk. v. Fulner*, 3 Pa. St., 389.

(4) *Other states:* *Life Ins. Co. v. Pendleton*, 112 U. S., 708; *Wollenweher v. Ketterinn*, 17 Pa. St., 389.

**SEC. 3060-a115. When notice need not be given to indorser.** Notice of dishonor is not required to be given to an indorser in either of the following cases:

1. Where the drawee is a fictitious person or a person not having capacity to contract and the indorser was aware of the fact at the time he indorsed the instrument.
2. Where the indorser is the person to whom the instrument is presented for payment.
3. Where the instrument was made or accepted for his accommodation. [29 G. A., ch. 130, § 115.]

(2) *Other states: In re Swift*, 106 Fed., 65, is a case arising under this statute.

(3) *Iowa: Possession by an indorser of a note at maturity waives demand and notice. Lomax v. Smyth*, 50-223.

*Other states: French v. Bank of Columbia*, 4 Cranch, 141; *Blenderman v. Price*, 50 N. J. L., 296.

**SEC. 3060-a116. Notice of non-payment where acceptance refused.** Where due notice of dishonor by non-acceptance has been given, notice of a subsequent dishonor by non-payment is not necessary, unless in the meantime the instrument has been accepted. [29 G. A., ch. 130, § 116.]

See Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 187.

**SEC. 3060-a117. Effect of omission to give notice of non-acceptance.** An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission. [29 G. A., ch. 130, § 117.]

**SEC. 3060-a118. When protest need not be made—when must be made.** Where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment as the case may be; but protest is not required, except in the case of foreign bills of exchange. [29 G. A., ch. 130, § 118.]

(1) *Iowa: Unless the specified place of payment be at a bank, a deposit of money at such place to meet the note will not be a payment, the holder not being required to make presentment at that place. Callanan et al. v. Williams et al.*, 71-363; *Englert v. White*, 92-97; *Klindt v. Higgins*, 95-529; *Baumgartner v. Peterson*, 93-572;

The rule is probably otherwise where the specified place of payment is at a bank. *Bank v. Ingerson*, 105-349. Payment to payee, who is a trustee, before maturity with knowledge of assignment, is not a satisfaction of the indebtedness, and such payment will not protect the maker. *Livermore v. Maxwell*, 87-705. Payment to an agent not in possession of the instrument is done at the peril of the payor; so too, is payment before maturity, the paper remaining outstanding. *Security Co. v. Graybeal*, 85-543; *U. S. Bank v. Burson et al.*, 90-191. Where note is payable at a specified place, maker can only exonerate himself from payment of interest by showing that he had funds at the place for the discharge of the note. *Robinson v. Lair*, 31-9. Presumption of ownership arises from the possession of a note after maturity. *Graff v. Adams et al.*, 100-481; *Stoddard v. Burton*, 41-582; and payment of a note before maturity, made payable "on or before" to the holder thereof will be upheld. *Stoddard v. Burton, supra*.

*Other states: Bay v. Church*, 15 Conn., 129; *Legg v. Vinal*, 165 Mass., 555; *Stephenson v. Dickson*, 24 Pa. St., 148.

#### DISCHARGE OF NEGOTIABLE INSTRUMENTS.

**SEC. 3060-a119. Instrument—how discharged.** A negotiable instrument is discharged:

1. By payment in due course by or on behalf of the principal debtor.
2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation.
3. By the intentional cancellation thereof by the holder.
4. By any other act which will discharge a simple contract for the payment of money.

5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right. [29 G. A., ch. 130, § 119.]

(1) *Other states:* Possession of a bill by the acceptor after it has been in circulation, is *prima facie* evidence that it has been paid by him. *Baring v. Clark*, 19 Pick. 220. So the possession of a promissory note by the maker. *Bank v. Harris*, 7 Wash. 139; *Madison Square Bk. v. Pierce*, 137 N. Y., 444.

For citation of other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 200.

**SEC. 3060-a120. When persons secondarily liable on—discharged.**

A person secondarily liable on the instrument is discharged:

1. By an act which discharges the instrument.
2. By the intentional cancellation of his signature by the holder.
3. By the discharge of a prior party.
4. By the valid tender of payment made by a prior party.
5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved.
6. By an agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved. [29 G. A., ch. 130, § 120.]

(3) *Other states:* *Shutts v. Fingar*, 100 N. Y., 539; *Couch v. Waring*, 9 Conn., 261; *Gennis v. Weighley*, 114 Pa. St., 194.

(5) *Other states:* By an express reservation of the holder's rights against the drawer or indorser, their rights against the maker or acceptor are reserved by implication. *Gloucester Bk. v. Worcester*, 10 Pick., 528; *Tombeckbe Bk. v. Stratton*, 7 Wend., 429.

(6) For authorities under this head see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 201.

**SEC. 3060-a121. Right of party who discharges instrument**

Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except:

1. Where it is payable to the order of a third person, and has been paid by the drawer; and
2. Where it was made or accepted for accommodation, and has been paid by the party accommodated. [29 G. A., ch. 130, § 121.]

(2) *Iowa:* Maker is not released by extension given to the indorser or the taking of security from the indorser. *Writing v. Western Stage Co.*, 20 551.

For a citation of authorities to this section see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 202.

**SEC. 3060-a122. Renunciation by holder.** The holder may expressly renounce his rights against any party to the instrument before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon. [29 G. A., ch. 130, § 122.]

**SEC. 3060-a123. Cancellation—unintentional—burden of proof.** A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been cancelled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority. [29 G. A., ch. 130, § 123.]

**SEC. 3060-a124. Alteration of instrument—effect of.** Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereon according to its original tenor. [29 G. A., ch. 130, § 124.]

*Iowa:* The severance of one portion of a contract, which leaves one portion in the form of a negotiable promissory note, signed by one of the parties, constitutes such a material alteration that recovery cannot be had on the note, even in the hands of a *bona fide* purchaser for value before maturity, unless the maker is chargeable with gross negligence in its execution. *Scofield v Ford*, 56-370. Proof of material alteration since acceptance by drawee casts the burden upon the holder, of showing purchase in good faith without notice of alteration. *Smith v Eals*, 81-235; *Conger v Crabtree*, 88-536. See *Nat. Bk. v. Zeims*, 93-140.

*Other states:* See *Jeffries v. Rosenfeld* (Mass.), 61 N. E., 49, where the effect of this provision was discussed but not decided. The burden of explaining an apparent alteration is upon the party producing the paper. *Town of Solon v. Williamsburgh Savings Bk.*, 114 N. Y., 122, 135; *Simpson v. Davis*, 119 Mass., 269; *Gettysburg Nat. Bk., v. Chisolm*, 169 Pa. St., 564.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 205.

**SEC. 3060-a125. What constitutes a material alteration.** Any alteration which changes:

1. The date.
2. The sum payable, either for principal or interest.
3. The time or place of payment.
4. The number or the relations of the parties.
5. The medium or currency in which payment is to be made.

Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration. [29 G. A., ch. 130, § 125.]

(1) *Other states:* *National Ulster Co. Bk. v. Madden*, 114 N. Y., 280; *Crawford v. West Side Bk.*, 100 N. Y., 50, 56; *Wood v. Steele*, 6 Wall., 80; *Newman v. King* (Ohio), 43 N. E., 683

(2) *Other states:* *Gettysburg Nat. Bk. v. Chisolm*, 169 Pa. St., 564.

(3) *Other states:* *Rogers v. Vosburgh*, 87 N. Y., 208; *Weyman v. Yeomans*, 84 Ill., 403.

(5) *Other states:* *Angle v. Ins. Co.*, 92 U. S., 330

For a citation of other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 206.

#### BILLS OF EXCHANGE—FORM AND INTERPRETATION.

**SEC. 3060-a126. Bill of exchange defined.** A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer. [29 G. A., ch. 130, § 126.]

*Other states:* *Jarvis v. Wilson*, 46 Conn., 191.

**SEC. 3060-a127. Bill not an assignment of funds in hands of drawee.** A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same. [29 G. A., ch. 130, § 127.]

*Other states:* *Harris v. Clark*, 3 N. Y., 93; *Mandeville v. Welch*, 5 Wheat., 286; *Brill v. Tuttle*, 81 N. Y., 454; *Throop Grain Cleaner Co., v. Smith*, 110 N. Y., 83.

**SEC. 3060-a128. Bill addressed to more than one drawee.** A bill may be addressed to two or more drawees jointly, whether they are partners

or not; but not to two or more drawees in the alternative or in succession. [29 G. A., ch. 130, § 128.]

**SEC. 3060-a129. Inland and foreign bills of exchange.** An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this state. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill. [29 G. A., ch. 130, § 129.]

*Other states: Commercial Bk. of Ky. v. Varnum, 49 N. Y., 269; Life Ins. Co. v. Pendleton, 112 U. S., 696; Armstrong v. Am. Exch. Nat. Bk., 133 U. S., 433; Phoenix Bk. v. Hussey, 12 Pick., 483.*

**SEC. 3060-a130. When bill may be treated as promissory note.** Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument at his option either as a bill of exchange or a promissory note. [29 G. A., ch. 130, § 130.]

See section 3060-a17.

**SEC. 3060-a131. Referee in case of need.** The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not, as he may see fit. [29 G. A., ch. 130, § 131.]

The usual form is: "In case of need, apply to Messrs. C. and D. at E." Chitty on Bills, 165.

**SEC. 3060-a132. Acceptance of bills of exchange—acceptance—how made—et cetera.** The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the \*drawer. It must not express that the drawee will perform his promise by any other means than the payment of money. [29 G. A., ch. 130, § 132.]

*Iowa:* A conditional acceptance cannot be held to charge an indorsee of the bill before maturity with equities arising out of original transaction between drawer and acceptor. *Merritt v. Nihart, 11-57.* Evidence tending to show either an express or implied promise of acceptance held admissible. *Smith v. Clark & Whiting, 12-32.*

*Other states:* This contract is regarded as a new contract. *Superior City v. Ripley, 138 U. S., 93.* The usual mode of making an acceptance is by writing the word "accepted" and subscribing the drawee's name. Byles on Bills, 190. Acceptance by telegraph may be made by the party and such an acceptance is within the terms of the statute requiring acceptances to be in writing. *North Atchison Bk. v. Garretson, 51 Fed., 167.* But to require the acceptance to be on the instrument itself would preclude the giving of an acceptance by telegraph.

**SEC. 3060-a133. Holder entitled to acceptance on face of bill.** The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and if such request is refused, may treat the bill as dishonored. [29 G. A., ch. 130, § 133.]

**SEC. 3060-a134. Acceptance by separate instrument.** Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value. [29 G. A., ch. 130, § 134.]

**SEC. 3060-a135. Promise to accept—when equivalent to acceptance.** An unconditional promise in writing to accept a bill before it is drawn

\*[The use of the word "drawer" here is undoubtedly a mistake, and one which occurred in the adoption of the same law originally in New York. But New York has since corrected the matter by substituting the word "drawee." See laws N. Y., 1898, c. 336.—Ed.]

is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value. [29 G. A., ch. 130, § 135.]

*Other states:* An absolute authority to draw is equivalent to an unconditional promise to pay. *Ruiz v. Renault*, 100 N. Y., 256; *Merchants Bk. v. Griswold*, 72 N. Y., 472, 479. At common law an oral promise was sufficient. *Scudder v. Union Nat. Bk.*, 91 U. S., 406.

For a citation of other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 223.

**SEC. 3060-a136. Time allowed drawee to accept.** The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill; but the acceptance, if given, dates as of the day of presentation. [29 G. A., ch. 130, § 136.]

**SEC. 3060-a137. Liability of drawee retaining or destroying bill.** Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same. [29 G. A., ch. 130, § 137.]

*Other states:* *Matteson v. Moulton*, 79 N. Y., 627.

**SEC. 3060-a138. Acceptance of incomplete bill.** A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment. But when a bill payable after sight is dishonored by non-acceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment. [29 G. A., ch. 130, § 138.]

**SEC. 3060-a139. Kinds of acceptance.** An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn. [29 G. A., ch. 130, § 139.]

**SEC. 3060-a140. What constitutes a general acceptancy.** An acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only and not elsewhere. [29 G. A., ch. 130, § 140.]

*Other states:* *Wallace v. McConnell*, 13 Pet., 136. See note to section 3060-a70.

**SEC. 3060-a141. Qualified acceptance.** An acceptance is qualified, which is:

1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated.
2. Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn.
3. Local, that is to say, an acceptance to pay only at a particular place.
4. Qualified as to time.
5. The acceptance of some one or more of the drawees, but not of all. [29 G. A., ch. 130, § 141.]

(1) *Other states:* Such an acceptance does not become due until the happening of the contingency upon which the bill is accepted. *Brockway v. Allen*, 17 Wend., 40; *Newhall v. Clark*, 3 Cush., 376.

**SEC. 3060-a142. Rights of parties to qualified acceptance.** The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-acceptance. Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto. When the drawer or an indorser receives notices of a qualified

acceptance, he must within a reasonable time express his dissent to the holder, or he will be deemed to have assented thereto. [29 G. A., ch. 130, § 142.]

*Other states: Walker v. N. Y. St. Bk.*, 9 N. Y., 582.

PRESENTMENT OF BILLS OF EXCHANGE FOR ACCEPTANCE.

**SEC. 3060-a143. When presentment for acceptance must be made.**

Presentment of acceptance must be made:

1. Where the bill is payable after sight, or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument; or
2. Where the bill expressly stipulates that it shall be presented for acceptance; or
3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable. [29 G. A., ch. 130, § 143.]

*Other states: Allen v. Suydam*, 17 Wend., 368. A bill payable at a fixed period from its date may be presented for acceptance at any time. *Bachelor v. Priest*, 12 Pick., 399; *Oxford Bk. v. Davis*, 4 Cush., 188.

**SEC. 3060-a144. When failure to present releases drawer and indorser.** Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fail to do so, the drawer and all indorsers are discharged. [29 G. A., ch. 130, § 144.]

*Other states: Robinson v. Ames*, 20 Johns., 146; *Prescott Bk. v. Coverly*, 7 Gray, 217; *Walsh v. Dort*, 23 Wis., 334.

**SEC. 3060-a145. Presentment—how made.** Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour, on a business day and before the bill is overdue, to the drawer\* or some person authorized to accept or refuse acceptance on his behalf; and:

1. Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only.
2. Where the drawee is dead, presentment may be made to his personal representative.
3. Where the drawee has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee. [29 G. A., ch. 130, § 145.]

The holder may require agent to show authority. Daniel on Neg. Insts., sec. 487.

*Other states: Smith v. Melton*, 133 Mass., 369.

**SEC. 3060-a146. On what days presentment may be made.** A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections seventy-two and eighty-five of this act. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock noon on that day. [29 G. A., ch. 130, § 146.]

**SEC. 3060-a147. Presentment where time is insufficient.** Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time with the exercise of reasonable dili-

\*[This should be "drawee." The mistake arises from following the original New York draft where the same error appears. It was corrected by Laws N. Y., 1898, ch. 336.—Ed.]

gence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers. [29 G. A., ch. 130, § 147.]

**SEC. 3060-a148. Where presentment is excused.** Presentment for acceptance is excused and a bill may be treated as dishonored by non-acceptance, in either of the following cases:

1. Where the drawee is dead, or has absconded, or is a fictitious person or a person not having capacity to contract by bill.

2. Where after the exercise of reasonable diligence, presentment cannot be made.

3. Where although presentment has been irregular, acceptance has been refused on some ground. [29 G. A., ch. 130, § 148.]

*Other states: Schmittler v. Simon, 101 N. Y., 554.*

**SEC. 3060-a149. When dishonored by non-acceptance.** A bill is dishonored by non-acceptance:

1. When it is duly presented for acceptance and such an acceptance as is prescribed by this act is refused or cannot be obtained; or

2. When a presentment for acceptance is excused and the bill is not accepted. [29 G. A., ch. 130, § 149.]

**SEC. 3060-a150. Duty of holder where bill is not accepted.** Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers. [29 G. A., ch. 130, § 150.]

**SEC. 3060-a151. Rights of holders where bill is not accepted.** When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder and no presentment for payment is necessary. [29 G. A., ch. 130, § 151.]

**SEC. 3060-a152. Protest of bills of exchange—in what cases protest necessary.** Where a foreign bill appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof, in a case of dishonor is unnecessary. [29 G. A., ch. 130, § 152.]

*Other states: Commercial Bank v. Varnum, 49 N. Y., 269, 275; Dennistoun v. Stuart, 17 How. (U. S.), 606; Bank v. Hussey, 12 Pick., 483.*

See Byles on Bills, 256.

**SEC. 3060-a153. Protest—how made.** The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify:

1. The time and place of presentment.

2. The fact that presentment was made and the manner thereof.

3. The cause or reason for protesting the bill.

4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found. [29 G. A., ch. 130, § 153.]

[For its competency as evidence of what facts, see Code sec. 4624.—Ed.]

*Iowa:* The certificate or protest is only evidence of notice when it recites that notice was given. *Sather v. Rogers, 10-231; Thorp v. Craig, 10-461.*

It is only evidence of the facts therein recited, and where it shows that the notice was directed to the indorser at a particular place it will not be presumed that such place was the residence of such indorser. *Bradshaw v. Hedge, 10-402.*

But a certificate of protest stating that the notary notified the indorsers is sufficient

although it does not show that the residence of the several parties are at the places to which the notices were addressed. *Fuller v. Dingman*, 41-506.

It is not necessary to annex to, or set out in, the notary's certificate, the notice referred to therein, nor need the certificate, in words, formally refer to the seal. *Jones v. Berryhill* 25-289.

If the certificate states that notices of protest properly addressed were deposited in the post-office, it will be presumed that the postage was prepaid. *Brooks v. Day*, 11-46.

When the certificate of protest states that the notary notified the proper parties in a certain manner, the credit due the certificate will generate the presumption that the mode adopted accomplished the result certified to, unless it affirmatively appear that the method adopted could not have done so; but if the notary only certifies as to the steps taken, then, to make out a *prima facie* case, it must further appear that such steps would effectuate notice. *Wamsley v. Rivers*, 34-463.

The fact that the certificate is dated at a time subsequent to that of the dishonor and protest will not render it incompetent. *Chatham Bank v. Allison*, 15-357.

The protest of a notary is not receivable without his seal, but such defect may be cured by the affixing of the seal by the notary at the trial. *Rindskoff v. Malone*, 9-540.

The certificate of a notary public as to the protest of a bill or note is not admissible against defendant in a criminal case, as he is entitled to be confronted with the witnesses against him. *State v. Reidel*, 26-430.

*Other states:* Signature of notary may be printed. *Bank of Cooperstown v. Woods*, 28 N. Y., 561.

(1) *Other states:* *Duckert v. Von Lilienthal*, 11 Wis., 56.

(4) *Other states:* Notarial certificate of protest is competent without further proof. *Porter v. Judson*, 1 Gray, 175; *Pierce v. Indseth*, 106 U. S., 546. And the different states of the Union are deemed foreign to each other so that the notarial certificate of protest under seal is good on mere production. *Townstey v. Sumrall*, 2 Pet., 170; *Halliday v. McDougall*, 20 Wend., 81; *Johnson v. Brown*, 154 Mass., 105, 106.

For a citation of other authorities see Crawford's Annotated Neg. Inst. Law, (2 Ed.), sec. 261.

**SEC. 3060-a154. Protest—by whom made.** Protest may be made by:

1. A notary public; or
2. By any reputable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses. [29 G. A., ch. 130, § 154.]

*Other states:* Notary must make presentment and demand in person. *Commercial Bk. v. Varnum*, 49 N. Y., 269, 275; *Ocean Nat. Bk. v. Williams*, 102 Mass., 141. Notary who is an officer of a bank may legally protest paper belonging to the bank. *Nelson v. First Nat. Bk.* 69 Fed., 798; 16 C. C. A., 425.

**SEC. 3060-a155. Protest—when to be made.** When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting. [29 G. A., ch. 130, § 155.]

See Byles on Bills, 257.

**SEC. 3060-a156. Protest—where made.** A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable; and no other presentment for payment to, or demand on, the drawee is necessary. [29 G. A., ch. 130, § 156.]

See Daniel on Neg. Insts., sec. 935; and Byles on Bills, 257.

**SEC. 3060-a157. Protest both for non-acceptance and non-payment.** A bill which has been protested for non-acceptance may be subsequently protested for non-payment. [29 G. A., ch. 130, § 157.]

See Daniel on Neg. Insts., sec. 1464.

**SEC. 3060-a158. Protest before maturity where acceptor insolvent.** Where the acceptor has been adjudged a bankrupt or an insolvent or has

made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers. [29 G. A., ch. 130, § 158.]

**SEC. 3060-a159. When protest dispensed with.** Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence. [29 G. A., ch. 130, § 159.]

**SEC. 3060-a160. Protest where bill is lost, et cetera.** Where a bill is lost or destroyed, or is wrongfully detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof. [29 G. A., ch. 130, § 160.]

#### ACCEPTANCE OF BILLS OF EXCHANGE FOR HONOR.

**SEC. 3060-a161. When bill may be accepted for honor.** Where a bill of exchange has been protested for dishonor by non-acceptance, or protested for better security, and is not overdue, any person not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill *supra* protest for the honor of any party liable thereon or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be for part only of the sum for which the bill is drawn, and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party. [29 G. A., ch. 130, § 161.]

See Byles on Bills, 262-266.

**SEC. 3060-a162. Acceptance for honor—how made.** An acceptance for honor *supra* protest must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor. [29 G. A., ch. 130, § 162.]

**SEC. 3060-a163. When deemed to be an acceptance for honor of the drawer.** Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer. [29 G. A., ch. 130, § 163.]

**SEC. 3060-a164. Liability of acceptor for honor.** The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted. [29 G. A., ch. 130, § 164.]

*Other states: Baring v. Clark, 19 Pick., 220.*

**SEC. 3060-a165. Agreement of acceptor for honor.** The acceptor for honor by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided also that it shall have been duly presented for payment and protested for non-payment and notice of dishonor given to him. [29 G. A., ch. 130, § 165.]

**SEC. 3060-a166. Maturity of bill payable after sight—accepted for honor.** When a bill payable after sight is accepted for honor its maturity is calculated from the date of the noting for non-acceptance and not from the date, of the acceptance for honor. [29 G. A., ch. 130, § 166.]

**SEC. 3060-a167. Protest of bill accepted for honor, et cetera.** Where a dishonored bill has been accepted for honor *supra* protest or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honor or referee in case of need. [29 G. A., ch., 130, § 167.]

**SEC. 3060-a168. Presentment for payment to acceptor for honor—how made.** Presentment for payment to the acceptor for honor must be made as follows:

1. If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity.
2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section 104. [29 G. A., ch. 130, § 168.]

See Byles on Bills, 263.

**SEC. 3060-a169. When delay in making presentment is excused.** The provisions of section eighty-one apply where there is delay in making presentment to the acceptor for honor or referee in case of need. [29 G. A., ch. 130, § 169.]

**SEC. 3060-a170. Dishonor of bill by acceptor for honor.** When the bill is dishonored by the acceptor for honor it must be protested for non-payment by him. [29 G. A., ch. 130, § 170.]

#### PAYMENT OF BILLS OF EXCHANGE FOR HONOR.

**SEC. 3060-a171. Who may make payment for honor.** Where a bill has been protested for non-payment, any person may intervene and pay it *supra* protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn. [29 G. A., ch. 130, § 171.]

See Daniel on Neg. Insts., sec 1254. Byles on Bills, 267-269.

**SEC. 3060-a172. Payment for honor—how made.** The payment for honor *supra* protest in order to operate as such and not as a mere voluntary payment must be attested by a notarial act of honor which may be appended to the protest or form an extension to it. [29 G. A., ch. 130, § 172.]

See Daniel on Neg. Insts., sec. 1258. Byles on Bills, 267. *Konig v. Bayard*, 1 Pet., 250.

**SEC. 3060-a173. Declaration before payment for honor.** The notarial act of honor must be founded on a declaration made by the payer for honor or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays. [29 G. A., ch. 130, § 173.]

**SEC. 3060-a174. Preference of parties offering to pay for honor.** Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference. [29 G. A., ch. 130, § 174.]

**SEC. 3060-a175. Effect on subsequent parties where bill is paid for honor.** Where a bill has been paid for honor all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter. [29 G. A., ch. 130, § 175.]

See Daniel on Neg. Insts., sec. 1255.

**SEC. 3060-a176. Where holder refuses to receive payment *supra* protest.** Where the holder of a bill refuses to receive payment *supra* protest, he loses his right of recourse against any party who would have been discharged by such payment. [29 G. A., ch. 130, § 176.]

**SEC. 3060-a177. Rights of payer for honor.** The payer for honor on paying to the holder the amount of the bill and the notarial expenses inci-

dental to its dishonor, is entitled to receive both the bill itself and the protest. [29 G. A., ch. 130, § 177.]

BILLS IN A SET.

**SEC. 3060-a178. Bills in sets constitute one bill.** Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitute one bill. [29 G. A., ch. 130, § 178.]

See Daniel on Neg. Insts., sec. 113. Byles on Bills, 387. *Durkin v. Cranston*, 7 Johns, 442.

**SEC. 3060-a179. Rights of holders where different parts are negotiated.** Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him. [29 G. A., ch. 130, § 179.]

*Other states: Walsh v. Blatchley*, 6 Wis., 422. Byles on Bills, 389.

**SEC. 3060-a180. Liability of holder who indorses two or more parts of a set to different persons.** Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills. [29 G. A., ch. 130, § 180.]

See Byles on Bills., 389.

**SEC. 3060-a181. Acceptance of bills drawn in sets.** The acceptance may be written on any part and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill. [29 G. A., ch. 130, § 181.]

*Other states: Dounes & Co. v. Church*, 13 Pet., 205; *Walsh v. Blatchley*, 6 Wis., 422.

**SEC. 3060-a182. Payment by acceptor of bills drawn in sets.** When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon. [29 G. A., ch. 130, § 182.]

See Byles on Bills, 389.

**SEC. 3060-a183. Effect of discharging one of a set.** Except as herein otherwise provided where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged. [29 G. A., ch. 130, § 183.]

PROMISSORY NOTES AND CHECKS.

**SEC. 3060-a184. Promissory note defined.** A negotiable promissory note within the meaning of this act is an unconditional promise in writing made by one person to another, signed by the maker engaging to pay on demand or at a fixed or determinable future time, a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order, it is not complete until indorsed by him. [29 G. A., ch. 130, § 184.]

*Other states: Curran v. Witter*, 68 Wis., 16. A note payable to the order of the maker is a negotiable note. *Miller v. Weeks*, 22 Pa. St., 89.

**SEC. 3060-a185. Check defined.** A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the

provisions of this act [are] applicable to a bill of exchange payable on demand apply to a check. [29 G. A., ch. 130, § 185.]

[The word "are" enclosed in brackets, appears in the enrolled bill, as passed, but it does not appear in the original act as adopted in the other states.—Ed.]

*Iowa: N. W. Coal Co. v. Bowman*, 69-152.

*Other states:* One of the characteristics which distinguishes a check from a bill of exchange is that a check is always drawn on a bank or banker. *Harris v. Clark*, 3 N. Y., 93, 115; *Bull v. Bank of Kasson*, 123 U. S., 105; *Rogers v. Durant*, 140 U. S., 298; *Ridgeley Bk. v. Patton*, 109 Ill., 484; *Harrison v. Nicollet Nat. Bk.*, 41 Minn., 489.

That a draft upon a bank not payable immediately is a bill of exchange, see *Bowen v. Newell*, 8 N. Y., 190; *Harrison v. Nicollet Nat. Bk.*, 1 Minn., 488.

For other authorities, see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 321.

**SEC. 3060-a186. Within what time a check must be presented.**

A check must be presented for payment within a reasonable time after its issue, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay. [29 G. A., ch. 130, § 186.]

*Other states:* See *Industrial Bk. of Chicago v. Bowes*, 165 Ill., 70. For instances of unreasonable delay, see *Gifford v. Hardell*, 88 Wis., 538; *First Nat. Bk. v. Miller*, 43 Neb., 791; *Grange v. Reigh*, 93 Wis., 552; *Western Wheel Scraper Co. v. Sadilek*, 50 Neb., 105; *Holmes v. Roe*, 62 Mich., 199. For a discussion of the question as to whether or not the death of the drawer operates as a revocation of the authority to pay a check, see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 322.

**SEC. 3060-a187. Certification of check—effect of.** Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance. [29 G. A., ch. 130, § 187.]

*Other states:* *Merchants Bk. v. State Bk.*, 10 Wall., 648; *Cooke v. State Nat. Bk.*, 52 N. Y., 96.

**SEC. 3060-a188. Effect where the holder of check procures it to be certified.** Where the holder of a check procures it to be accepted or certified, the drawer and all indorsers are discharged from liability thereon. [29 G. A., ch. 130, § 188.]

*Other states:* *Minot v. Russ*, 156 Mass., 458; *Metropolitan Bk. v. Jones*, 137 Ill., 634; *Medirian Nat. Bk. v. First Nat. Bk. (Ind.)*, 33 N. E., 247.

**SEC. 3060-a189. When check operates as an assignment.** A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check. [29 G. A., ch. 130, § 189.]

*Other states:* *Bank v. Millard*, 10 Wall., 152; *Bank v. Schuler*, 120 U. S., 511; *Florence Mills Co. v. Brown*, 124 U. S., 385.

For the citation of numerous other authorities supporting the rule adopted by the text, see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 325.

GENERAL PROVISIONS.

**SEC. 3060-a190. Short title.** This act shall be known as the Negotiable Instrument Law. [29 G. A., ch. 130, § 190.]

See Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 1.

**SEC. 3060-a191. Definitions and meaning of terms.** In this act, unless the context otherwise requires:

"Acceptance" means an acceptance completely\* by delivery or notification.

"Action" includes counter-claim and set-off.

\*[This is undoubtedly an error, although the same word is used in the enrolled bill. The corresponding word in the New York act is "completed."—Ed.]

“Bank” includes any person or association of persons carrying on the business of banking, whether incorporated or not.

“Bearer” means the person in possession of a bill or note which is payable to bearer.

“Bill” means bill of exchange, and “note” means negotiable promissory note.

“Delivery” means transfer of possession, actual or constructive, from one person to another.

“Holder” means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof.

“Indorsment” means an indorsement completed by delivery.

“Instrument” means negotiable instrument.

“Issue” means the first delivery of the instrument, complete in form, to a person who takes it as a holder.

“Person” includes a body of persons, whether incorporated or not.

“Value” means valuable consideration.

“Written” includes printed, and “writing” includes print. [29 G. A., ch. 130, § 191.]

**SEC. 3060-a192. Person primarily liable on instrument.** The person “primarily” liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are “secondarily” liable. [29 G. A., ch. 130, § 192.]

See Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 3.

**SEC. 3060-a193. Reasonable time—what constitutes.** In determining what is a “reasonable time” or an “unreasonable time” regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case. [29 G. A., ch. 130, § 193.]

*Iowa: Northwestern Coal Co. v. Bowman, 69-153.*

**SEC. 3060-a194. Time—how computed—when last day falls on holiday.** Where the day, or the last day, for doing an act herein required or permitted to be done falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day. [29 G. A., ch. 130, § 194.]

**SEC. 3060-a195. Application of chapter.** The provisions of this act do not apply to negotiable instruments made and delivered prior to the passage hereof. [29 G. A., ch. 130, § 195.]

**SEC. 3060-a196. Law merchant—when governs.** In any case not provided for in this act, the rules of the law merchant shall govern. [29 G. A., ch. 130, § 196.]

*Other states: Prescott Bk. v. Coverly, 7 Gray, 217.*

See note in Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 7.

[Section 197 of the act is Section 3060-a *supra*; as the entire section relates simply to the matter of repeal of certain sections of the Code, relating to bills and notes, it is deemed best to insert it in advance of the other sections of the act.—Ed.]

**SEC. 3060-a198. Days of grace—demand made on.** A demand made on any one of the three days following the day of maturity of the instrument, except on Sunday or a holiday, shall be as effectual as though made on the day on which demand may be made under the provisions of this act, and the provisions of this act as to notice of non-payment, non-acceptance, and as to protest shall be applicable with reference to such demand as though the demand were made in accordance with the terms of this act; but the provisions of this section shall not be construed as authorizing demand on any day after the third day from that on which the instrument falls due according to its face. [29 G. A., ch. 130, § 198.]

[Sections 3050 and 3051 of the Code, relating to **grace** are repealed by section 3060-a, *supra*. The repeal of the statute allowing grace, while the above section permitting demand to be made on any of the three days following the maturity of the paper, for the purpose of fixing the liability of indorsers, would seem to make the instrument mature at different dates, as regards the maker and indorser, or indorsers, under some circumstances. This question might become important in bringing action against all parties under section 3465 of the Code.—Ed.]

## CHAPTER 4.

### OF TENDER.

#### SECTION 3062. When not accepted.

[For earlier annotations, see code, pages 1079-81.—Ed.]

Where a party attempts to rescind a contract made by his agent, which he claims to have been without authority, he must offer to return any money received by the agent in pursuance of such contract and such offer to return must be made to the opposite party in person; and it is not sufficient to notify him that it is held subject to his order at another place. *National Imp. & Const. Co. v. Maiken*, 103-118.

A tender which is kept good relieves the debtor from liability to pay interest on the amount so tendered. *Metropolitan Nat. Bank v. Commercial State Bank*, 104-682.

Where one party proposes to pay to the other the amount of a claim, and is advised by the latter that it will not be accepted, such offer amounts to a tender, although the money is not at the time produced, if the person making the offer could and would have produced it had the other party been willing to accept. *Steckel v. Standley*, 107-694.

Tender in a law action must be kept good by deposit of the money in court. *West v. Farmers' Mut. Ins. Co.*, 90 N. W., 523.

#### SEC. 3063. Receipt—objection.

[For earlier annotations, see code, page 1081.—Ed.]

The provision that the person to whom a tender is made must at the time make any objections which he may have to the money, etc., tendered, refers to the character or kind of money and not to the amount, and does not prevent him from afterwards insisting that the amount was

not sufficient. *McWhirter v. Crawford*, 104-550.

One who makes a tender may not couple it with a demand for a receipt in full for the claim. *West v. Farmers' Mut. Ins. Co.*, 90 N. W., 523.

## CHAPTER 5.

### OF SURETIES.

#### SECTION 3064. May require creditor to sue.

[For earlier annotations, see code, page 1082.—Ed.]

In the absence of any special statute requiring a creditor to proceed against the principal debtor or any act of the creditor releasing the lien held by him the

surety is not relieved by a failure of the creditor to enforce his claim against the debtor. *Whitehouse v. American Surety Co.*, 90 N. W., 727.

## CHAPTER 6.

### OF PRIVATE SEALS.

#### SECTION 3069. Consideration implied.

[For earlier annotations, see code, pages 1083-4.—Ed.]

The statutory provision that contracts in writing, signed by the parties to be bound, import a consideration was enacted

for the purpose of giving to instruments in writing the same effect as instruments under seal had under the common law,

and not to supply proof that the contract was based upon a particular consideration. No particular consideration is presumed, and where a wife sues her husband under a contract made during coverture, which

would be valid only so far as it affected her separate property, the burden is upon the wife to show that the contract was with reference to such separate property. *Heacock v. Heacock*, 108-540.

### SEC. 3070 Failure of—fraud.

[For earlier annotations, see code, page 1084.—Ed.]

While a consideration is presumed in a written contract, it is competent to show that in fact the instrument was without consideration, and parol evidence is competent for that purpose. Want or failure, in whole or in part, of the consideration

of a written contract may be shown as a defense, entire or partial as the case may be, except in the case of negotiable paper. *Beatty v. Carr* 109-183.

Section applied. *Piano Mfg. Co. v. Farrell*, 110-577.

## CHAPTER 7.

### OF ASSIGNMENTS FOR CREDITORS.

#### SECTION 3071. Must be without preferences.

[For earlier annotations, see code, pages 1085-90.—Ed.]

**What valid.** Where a general assignment is made, and as a part of the same transaction, and for the purpose of giving a preference, a mortgage is executed by the same party, the assignment and mortgage will both be void. *Groetzinger v. Wyman*, 105-574.

Mortgages made to the creditors, not with the intention of disposing of the mortgagor's business, but in the hopes of being able to continue the business, do not constitute an assignment and therefore are not necessarily fraudulent because of preferences thereby given. *Ibid.*

A debtor has a legal right to prefer some creditors to others, if he sees fit. *Steinke v. Yetzer*, 108-512.

In a particular case held chattel mortgages executed separately and prior to the time of making a general assignment, and without intention at the time to make such assignment, were valid. *Diemer v. Guernsey*, 112-393.

An insolvent corporation may make payment of its debts or give property in security thereof, just as a natural person may do, and may prefer one of its creditors over another. *First Nat. Bank v. Garretson*, 107-196.

**Intention.** One who takes a mortgage in good faith to secure a valid indebtedness is not affected by the intention of the debtor to make an assignment. *Ibid*; *Manton v. Seiberling*, 107-534; *Groetzinger v. Wyman*, 105-574.

A mortgagee who takes a mortgage without knowledge of an intent to make an assignment for the benefit of creditors is protected. *Mills v. Miller*, 109-688.

The burden is on the creditor attacking the mortgage to show that at the time it was executed there was also an intent to make a general assignment. *Ibid.*

Several mortgages are not to be taken

together as constituting a general assignment where they do not include all the property of the debtor. *Ibid.*

Where a mortgage is executed in pursuance of a prior agreement to give security, and comes to the knowledge of the mortgagee before the assignee under the assignment has accepted the trust, the mortgage will be valid. *Ibid.*

Aside from the provisions of the national bankruptcy law a creditor acting in good faith can take security from his debtor even though he knows there are other creditors and that the effect of his action will be to defeat them. But under the bankrupt law knowledge of such fact will render the preference fraudulent. *Boudinot v. Hamann*, 90 N. W., 497.

**Partial assignments.** The statutory provision as to assignment for benefit of creditors does not prevent partial assignments with preferences or sales or mortgages of any or all of the party's property in payment or security of indebtedness. *Rothschild v. Hasbrouck*, 72 Fed., 813.

**Conditions.** As an assignment would be subject to all prior valid liens, it is not invalidated by a provision that it is subject to a particular lien described, and such a provision does not estop the assignee from asserting the fraudulent character of the lien thus recognized. *Ringgen Stove Co. v. Bowers*, 109-175.

**What law governs.** In proceedings under an assignment for benefit of creditors the validity of a mortgage to a creditor, executed in another state upon real estate situated in this state, will be determined by the laws of this state. *Manton v. Seiberling*, 107-534.

**Effect of bankrupt law.** State insolvent laws are not suspended by the enactment of the national bankrupt act. *In re Scholtz*, 106 Fed., 834.

**SEC. 3072. How made—inventory—effect—recording.**

[For earlier annotations, see code, pages 1090-1.—Ed.]

The purchaser from an assignee cannot claim title to property which never passed through the hands of the assignee, and which was not intended to be covered by the instrument of assignment. *Gevers v. Farmer*, 109-468.

Where an assignment was made by one partner, and the other partner was within reach so that he might be consulted, held that the assignment did not become effectual until confirmed by such other partner. *Mills v. Miller* 109-688.

Where the assignee took possession of notes and book accounts belonging to the debtor firm, and was garnished therefor under an attachment issued at the suit of creditors, before the assignment which had been executed by one partner only had become valid by confirmation by the other partner, held that the garnishment took priority over the assignment. *Mills v. Miller*, 109-688.

The inventory is not conclusive as to the property passing by the assignment. *Turrill v. McCarthy*, 114-681.

**SEC. 3075. Claims filed.**

Where the creditor having security files his claim with the assignee, he is entitled to dividends only on that portion of his claim which is not satisfied by resorting to the security. He is subject to the equitable rule that where one creditor has security on two funds, on one of which other creditors have security, the former must first exhaust the fund on which he has an exclusive claim before resorting to that which is subject to the claims of other creditors. Therefore, where a creditor having security on property of the insolvent received payment on his claim from the proceeds of such property, held, that he

could only participate in dividends on the basis of the balance of his claim. *Doolittle v. Smith*, 104-403.

It is optional with the mortgagee whether he will enforce his lien against the property or file his claim with the assignee, but if he chooses the latter remedy he cannot thereafter foreclose his mortgage and is deemed to have waived his right to do so. *Garner v. Fry*, 104-515.

Sale by an assignee under assignment for the benefit of creditors of goods which are subject to chattel mortgage does not defeat the lien of the mortgagee. *In re Windhorst*, 107-58.

**SEC. 3078. Priority of taxes.**

[For earlier annotations, see code, page 1094.—Ed.]

The provisions of this section as to payment of taxes are only for the protection of the public revenues. Where the insolvent, being the holder of a mortgage, has assigned it, guaranteeing the payment of taxes, and the assignee of such mortgage

seeks to recover on the guaranty for taxes paid by him to protect his security, such assignee must file his claim for taxes paid, and is not entitled to protection under the provisions of this section. *In re Lewis Inv. Co.*, 89 N. W., 218.

**SEC. 3080. Settlement.**

[For earlier annotations, see code, page 1095.—Ed.]

Where an assignee does not include in his report a considerable amount of money received from the sale of goods under the assignment, and there is a discrepancy between the inventory and the property accounted for, he should not be discharged

until such discrepancy in his accounts is adjusted. A creditor entitled to share in the distribution of the proceeds of the estate may file exceptions to the assignee's report and be heard thereon. *In re Assignment of Mansfield*, 113-104.

**SEC. 3084. Sale of property.**

[For earlier annotations, see code, page 1096.—Ed.]

The order of sale should be entered of record, but a deed executed by the assignee without notice or order of court is not absolutely void, but will at least pass the naked legal title. *Bristol Sav. Bank v. Judd*, 89 N. W., 93.

The assignee has the same rights and

remedies relating to the estate as were possessed by the assignor, and may maintain action on an attachment bond given in favor of the assignor, either by original suit or by intervention in an action already brought against the assignor. *Ringen Stove Co. v. Bowers*, 109-175.

## CHAPTER 8.

## OF MECHANICS' LIEN.

## SECTION 3089. Who may have lien.

[For earlier annotations, see code, pages 1098-1101.—Ed.]

**Under contract with owner.** Material furnished for improvements on land under a contract with one who is not the owner thereof and a bare licensee, does not entitle the person furnishing the material under such contract to a lien on the land nor upon the improvements, which became the property of the owner of the land when made. *Hoag v. Hay*, 103-291.

Where a party is led to believe that one has a title or interest to which a mechanic's lien will attach, and he has not such title, but obtains it while the contract is being performed, the lien attaches thereto. *Floete v. Brown*, 104-154.

An owner of a limited estate erecting buildings on the land in pursuance of his interest therein has such an interest that a mechanic's lien may attach thereto. *Smith v. St. Paul F. & M. Ins. Co.*, 106-225.

Where premises were sold with an agreement on the part of the grantor to make improvements thereon which were subsequently made under a contract with him, held that the person making such improvements had not a mechanic's lien on the premises as against the grantee. *Des Moines Sav. Bank v. Goode* 106-568.

An equitable title to real property held by contract for a deed is a title to which a mechanic's lien will attach. *Sheppard v. Messenger*, 107-717.

The statutory definition of the term "owner" extends it so as to include persons who would not ordinarily be held to

come within its meaning. The term includes a vendee who acts as agent of the vendor, in a certain sense, in putting improvements on the premises. *Janes v. Osborne*, 108-409.

**Improvements on wife's land.** Where a wife knows that improvements are being placed on her property under contract with her husband, but protests against such improvements, her property is not subject to lien therefor. *James v. Dalbey*, 107-463.

**For what improvements or materials.** Where a lien is claimed under a contract involving matters for which a lien is not allowed, and it is not possible to determine under the contract what amount is due for matters for which a lien may be had, no lien whatever can be established. *Peatman v. Centerville Light, H. & P. Co.*, 105-1.

A well, designed, sunk and completed for permanent use on the premises, is an improvement for which a mechanic's lien may be had. *Hoppes v. Baie*, 105-648.

Lumber furnished, not merely for the purposes of replacing worn out parts of a building, but for the improvement of the building, will furnish the basis for a mechanic's lien. *National L. Ins. Co. v. Ayres*, 111-200.

It is the furnishing of material for a building which entitles a party to a lien and its actual use in the construction thereof need not be shown. *Frudden Lumber Co. v. Kinnan*, 90 N. W., 515.

## SEC. 3092. Filing statement.

[For earlier annotations, see code, pages 1102-5.—Ed.]

**What statement sufficient.** Where materials are furnished from time to time under separate and distinct contracts, the charges therefor cannot be treated as items of a continuous open running account and as furnished under an entire contract. *Hoag v. Hay*, 103-291.

An unintentional mistake in the statement which has caused no injury to any one will not defeat a mechanic's lien. *St. Croix Lumber Co. v. Davis*, 105-27.

The fact that the statement as filed is for a greater sum than due will not defeat the right to a lien where such discrepancy is the result of an honest mistake which is not prejudicial. *Simonson Bros. Mfg. Co. v. Citizens' State Bank*, 105-264.

Where the statement shows the essential facts, the lien will not be defeated by want of technical accuracy as to the time when the labor was performed or the material furnished. *Johnson v. Otto*, 105-605.

As against the owner the filing of an in-

sufficient statement or the failure to file any statement will not defeat the lien. *Hoppes v. Baie*, 105-648; *Ewing v. Stockwell*, 106-26.

The omission from the statement of credits to which the owner is entitled, if unintentional and without any purpose to defraud, will not defeat the lien. *Ewing v. Stockwell*, 106-26.

An honest mistake in making up the account will not deprive the claimant of the lien. *Green Bay Lumber Co. v. Thomas*, 106-420.

If the statement as a whole is just and true, the fact that the whole or part of the bill contracted for is furnished at an agreed price for a lot of items and it so shows instead of giving the price of each one separately, will not defeat the lien. *Queal v. Stradley*, 90 N. W., 588.

**Application of payments.** Change in the application of payments will not be permitted to be made between the owner

and the contractor when the effect will be to prejudice the interests of the subcontractor. *Green Bay Lumber Co. v. Thomas*, 106-420.

**Verification.** A statement not verified does not impart notice of a claim; and held that a verification signed in a firm name was not sufficient. *McGillivray v. Case*, 107-17.

**Failure to file.** The filing of the statement is not essential to the creation of the mechanic's lien, but only to preserve it against purchasers or incumbrancers in good faith without notice, whose rights accrue after the expiration of the time fixed for filing the statement. *Peatman v. Centerville Light, H. & P. Co.*, 105-1.

One claiming under a mortgage executed after expiration of the time for filing statement is not chargeable with notice of the claim. *McGillivray v. Case*, 107-17.

### SEC. 3093. Notice by sub-contractor—lien discharged.

[For earlier annotations, see code, pages 1106-8.—Ed.]

Where the owner has knowledge of the claims of a subcontractor, he should hold back from the principal contractor enough to pay the subcontractor's claim. *Simonson Bros. Mfg. Co. v. Citizens' State Bank*, 105-264.

The absconding of the principal contractor will not prevent the subcontractor from enforcing his claims against the property. A personal judgment against the principal contractor is not essential to the enforcement of such lien. The proceedings may properly be *in rem*, where no personal judgment is sought. *Ibid.*

Where the owner knew that the subcontractor was furnishing the material and knew that his bill therefor had not been paid, held, that the owner could not by settlement with the contractor cut off the rights of the subcontractor, especially where the payment was made in disregard of the terms of the contract. *Green Bay Lumber Co. v. Thomas*, 106-154.

But a subcontractor is not entitled to enforce his lien so far as payment has been made by the owner upon the strength of his statements and agreements. Under such circumstances the subcontractor is estopped from insisting upon repayment of the amount so paid. *Ibid.*

The giving to a contractor of an order for the amount of his claim, which is received by him, and the acceptance of such order by the drawee, amounting to only a recognition of a statement of the amount due, held not to deprive a subcontractor of his right to a lien. *Beach v. Wakefield*, 107-567.

Where a subcontractor perfects his lien within the time required by law, and the owner has knowledge that the subcontractor is furnishing material for which he has not been paid, the owner is not

Where the improvements were such that any person examining the building within the ninety days allowed for filing a lien would have been aware of them, held that they furnished sufficient foundation for a mechanic's lien. *National L. Ins. Co. v. Ayres*, 111-200.

Where lumber was furnished on two distinct occasions for successive improvements, held that the material man could not assert a claim for the first lot of lumber furnished under his lien for the second, which was furnished more than ninety days after the first improvement. *Ibid.*

Until something is done looking towards the establishment of the lien, an assignment of the debt does not operate as a transfer of such lien. *Kent v. Muscatine, N. & S. R. Co.*, 88 N. W., 935.

justified in paying other subcontractors until the time has expired for the filing of liens. *Green Bay Lumber Co. v. Adams*, 107-672.

The subcontractor is bound to know the terms of the contract between the principal contractor and the owner, whether they are written or oral, and if the owner complies with the terms of such contract in good faith, and without knowledge or notice which would require him to make inquiries as to the claims of the subcontractor, he will not be required to make a second payment. *Iowa Stone Co. v. Crissman*, 112-122.

The subcontractor's lien attaches to money due the contractor for extras, although the amount provided for under the contract as originally made has been fully paid. *Shope v. Mitchell*, 88 N. W., 813.

A bond given by the contractor to save the owner harmless from liens or claims of every kind enures to the benefit of subcontractors, material men and laborers. *Green Bay Lumber Co. v. Independent Sch. Dist.*, 90 N. W., 504.

If the owner after due notice still holds in his hands money enough out of the contract price to complete the building and pay the claim of the subcontractor he cannot disregard such claim and pay to the contractor the amount due him under his contract. *Frudden Lumber Co. v. Kinnan*, 90 N. W., 515.

Where the owner makes payments to the contractor without regard to the terms of his contract and without withholding amounts which he is authorized to withhold by the terms of the contract, he renders himself liable to persons who furnish materials for the carrying out of the contract. *Queal v. Stradley*, 90 N. W., 588.

**SEC. 3095. Priority.**

[For earlier annotations, see code, pages 1109-12.—Ed.]

**Lien covers entire property.** The right to a mechanic's lien for work done upon a railroad dates from the beginning of the improvement, and is against the whole road. *Beach v. Wakefield*, 107-567.

A railroad depot may be an integral part of the construction of the road. *Ibid.*

**Leasehold interest.** A lessee taking his lease after the time when a statement should be filed and when no statement is already filed, and without actual notice of the mechanic's lien, has priority thereto, and the assignee of such lessee is entitled to the same priority, even though at the time of taking the assignment he has notice of the lien. *Floete v. Brown*, 104-154.

Judgment under a mechanic's lien will take priority over a landlord's lien for rent, but under particular circumstances, held that by reason of a contract by which the lessor was to advance the money to pay off improvements the mechanic's lien was not effectual as against him. *Keys v. Whitlock Mfg. Co.*, 105-742.

**Mortgages and other liens.** A lien takes priority over any claim under an earlier mortgage which is satisfied on the record when the lien is filed. *Sioux City Electrical Supply Co. v. Sioux City, etc., Electrical R. Co.*, 106-573.

Where, by agreement between vendor and vendee, improvements were placed on

the premises, held, that a mechanic's lien for such improvements took priority over the vendor's lien for the purchase price. *Janes v. Osborne*, 108-409.

A mechanic's lien holder does not have priority over the claims of laborers under Code § 4019, even though the mechanic's lien antedates the laborers' claim. *Haw v. Burch*, 110-234.

**Lien upon improvements.** Under prior statutes held that the holder of a mechanic's lien for material furnished for an independent building took priority as to such building over a prior mortgage on the premises on which the building was erected, provided it should be found by the court that the building could be removed without material injury to the security of an earlier lien holder; but where no such finding was made the land must be sold and the proceeds applied first in payment of prior incumbrances. *Tower v. Moore*, 104-345.

Where the building or other improvement becomes a part of the real estate so that it may not be separately sold and removed, prior mortgagees or lien holders are entitled to priority over subsequent lien holders for improvements or independent structures to the extent of such prior liens. *Leach v. Minick*, 106-437.

**SEC. 3096. Definition of "owner."**

[For earlier annotations, see code, page 1112.—Ed.]

The statute extends the definition of the term "owner" so as to include persons whose relation to the property is such that they would not ordinarily be held to come

within the meaning of the term. *Janes v. Osborne*, 108-409. And see notes to Code § 3089 in this Supplement.

**SEC. 3099. Demand for bringing suit—assignment.**

[For earlier annotations, see code, pages 1113-4.—Ed.]

A mechanic's lien may be assigned prior to the filing of the statement. *Peatman v. Centerville Light, H. & P. Co.*, 105-1.

But until something is done looking to the establishment of the lien, an assignment of the debt does not transfer any lien. *Kent v. Muscatine, N. & S. R. Co.*, 88 N. W., 935.

Where one furnishes money to be applied

in payment of the purchase price of the property by taking up mechanic's liens of record thereon, under an express agreement that said liens are not to be canceled by the holders thereof, but to be assigned and held for the benefit of the purchaser, he is entitled to subrogation to the claims of the mechanic's lien holders. *National L. Ins. Co. v. Ayres*, 111-200.

**SEC. 3102. Public buildings or bridges—claim of subcontractor.**

[For earlier annotations, see code, page 1114.—Ed.]

Where a school district in making a contract for the erection of a schoolhouse reserved the right to withhold payments from the principal contractor so long as the subcontractors were unpaid, held that as against the assignees of the contractor the district might maintain an action for distribution of the fund due the contractor

among the subcontractors in proportion to their claims. *Independent Sch. Dist. v. Mardis*, 106-295.

Under such contract held that the claims which might be satisfied out of the fund were not limited to those which might be established under this section (20 G. A., ch. 179). *Ibid.*

A claim for money borrowed from a contractor and used in payment for labor and material is not a claim to be protected under such contract. *Ibid.*

In the case of a county building the public officer to whom the claim should be submitted is the auditor and not the chairman of the building committee of the board of supervisors. *Green Bay Lumber Co. v. Thomas*, 106-420.

Under the evidence in a particular case held that a subcontractor might have relief under this statute, although, as to prior work, he was given security by the assignment of certificates which he had surrendered. *Iowa Brick Co. v. Des Moines*, 111-272.

A bond given by a contractor to a public corporation to save it harmless from all claims and liens of laborers and others

enures to the benefit of laborers and material men who might assert a claim against the corporation for money payable to the contractor. *Green Bay Lumber Co. v. Independent Sch. Dist.*, 90 N. W., 504.

This statute does not create a lien in favor of a laborer or material man upon the funds due to the principal contractor nor is any lien created on the building or improvement itself. *Whitehouse v. American Surety Co.*, 90 N. W., 727.

Therefore a laborer or material man who is protected by a bond given by the contractor to the public corporation to secure it against the claims of such persons does not release the surety on such bond by failing to pursue his remedy against the fund due the contractor in the hands of the corporation. *Ibid*; *Read v. American Surety Co.*, 90 N. W., 590.

### SEC. 3105. Liens of miners.

The lien of a miner provided for by this section is not limited to property of the operator of the mine which might be removed, or to improvements which he has made, but extends to the premises on which the mine is situated, and which have been leased for mining purposes, to the extent at least that the value of the property has

been increased by the improvements made thereon by the mining lessee. *Mitchell v. Burwell*, 110-10.

The lessor cannot deduct from the value of such improvements, as a claim prior to that of the laborer, the amount due to such lessor for royalties. *Ibid.*

## CHAPTER 9.

### OF LIMITED PARTNERSHIP.

#### SECTION 3106. Authorized.

A contract by which a person contributed a specified sum to the common stock of a business, without any right to share in the profits, nor any responsibility for the losses, but with an agreement to have a per

cent. of the sum invested payable annually and in any event, held not to constitute such a person either a general or a limited partner. *Richardson v. Carlton*, 109-515.

## CHAPTER 10.

### OF WAREHOUSEMEN, CARRIERS, HOTEL KEEPERS, LIVERY STABLE KEEPERS, AND HERDERS.

#### SECTION 3127. Damages.

This section refers to a wilful departure from duty by the warehouseman, and not to a mere failure to observe legal require-

ments in attempting to enforce his lien. *Jeffries v. Snyder*, 110-359.

#### SEC. 3130. Unclaimed property—lien for charges.

The warehouseman is not obliged to take any steps towards selling the goods, but if he does it is imperative that he observe the statutory requirements. The pro-

cedure provided for is not a privilege, but a duty of the warehouseman in case he undertakes to sell stored property. *Jeffries v. Snyder*, 110-359.

#### SEC. 3131. Sale—notice.

It is for the jury to say whether the value of the goods exceeds \$100, and if so, whether the warehouseman knew this fact, or in the exercise of reasonable care should

have known it, and whether the notices required were posted according to law and actual notice was given to the owner. *Jeffries v. Snyder*, 110-359.

**SEC. 3138. Hotel and innkeepers—liability—lien.** Keepers of hotels, inns and eating houses and steamboat owners, who shall provide and keep therein a good and sufficient vault or safe for the deposit of money, jewels and other valuables, and shall provide a safe and commodious place for the baggage, clothing and other property belonging to their guests and patrons, and keep posted up in a conspicuous place in the office or other public room, and in the guests' apartments therein, printed notices, stating that such places for safe deposit are provided for the use and accommodation of the inmates thereof, shall not be liable for the loss of any money, jewels, valuables, baggage or other property not deposited with them, unless such loss shall occur through the fault or negligence of such landlord or keeper, or steamboat owner, his agent, servant or employe, but nothing herein contained shall apply to such reasonable amount of money, nor to such jewels, baggage, valuables or other property as is usual, fit and proper for any such guests to have and retain in their apartments or about their persons. Hotel, inn or eating house keepers shall have a lien upon, and may take and retain possession of, all baggage and other property belonging to or under the control of their guests, which may be in such hotel, inn or eating house, for the value of their accommodations and keep, and for all money paid for or advanced to, and for such extras and other things as shall be furnished, such guest, and such property so retained shall not be exempt from attachment or execution to the amount of the reasonable charges of such hotel, inn or eating house keeper, against such guest, and the costs of enforcing the lien thereon. [18 G. A., ch. 181.] [28 G. A., ch. 120, §§ 1, 2.]

This section gives to the innkeeper a lien, not only upon the property in fact belonging to the guest and brought by him to the hotel or inn, but likewise upon property placed therein which was under the guest's control. Therefore, held, that the

innkeeper's lien attached to sample goods carried by a traveling salesman, though the innkeeper had knowledge when receiving the salesman that the goods belonged to his employer. *Brown Shoe Co. v. Hunt*, 103-586.

## TITLE XVI.

### OF THE DOMESTIC RELATIONS.

#### CHAPTER 2.

##### OF HUSBAND AND WIFE.

#### SECTION 3154. Interest of either spouse in other's property.

[For earlier annotations, see code, pages 1125-6.—Ed.]

A contract by the husband to pay the wife a consideration for joining in a conveyance to cut off her dower right is invalid in view of the provisions of this section. *Miller v. Miller*, 104-186.

A contract between the wife and the husband for the payment to the wife of a share of the proceeds of property sold, on condition that she will join in the conveyance of the property for the purpose of releasing her dower interest, is not valid. *Garner v. Fry*, 104-515.

But if a portion of the proceeds is immediately given to the wife it will be valid as a gift and may be afterwards properly treated as her property. *Ibid.*

Either party may elect whether he or she will join in a conveyance, but cannot use the right for purposes of speculation or oppression. *Ibid.*

A contract between husband and wife as to the interest of the husband in the wife's property on her decease, is invalid, not only as to real property, but also as to personalty. *Poole v. Burnham*, 105-620.

Such contract is invalid as to property subsequently acquired. *Ibid.*

A contract between husband and wife as to the interest which the wife shall have in the husband's property, made in consideration of the abandonment by the wife of meritorious proceedings for divorce and the resumption of marital relations, is valid. *Fisher v. Koontz*, 110-498.

An antenuptial contract by which the

prospective wife's inchoate distributive share in the husband's estate is surrendered will be valid. Therefore a postnuptial contract between the husband and wife with reference to the effect which shall be given to such antenuptial contract as to the interest which the wife shall acquire in the husband's property is valid. *Ibid.*

The courts will rigidly scrutinize a contract apparently unjust or unreasonable in its terms, and especially where it operates to deprive a wife of her interest in the husband's estate without provision for her in the event she survive him. In such a case the burden is upon the husband or those representing him to show that the contract was fairly procured in order to have it upheld. *Ibid.*

A power of attorney given by a wife to her husband, authorizing him to relinquish her right of dower in the husband's real property, is of no validity. *Sawyer v. Biggart*, 114-489.

Nor will the wife be bound by ratification of a conveyance to which her name is signed by the husband under such power of attorney. *Ibid.*

A contract between husband and wife in settlement of a suit for separate maintenance, by which she relinquishes all claims to his estate, except as provided for in such contract, is not effectual to defeat the wife's contingent right of dower in the husband's property subsequently conveyed. *Newberry v. Newberry*, 114-704.

#### SEC. 3155. Remedy by one against the other.

[For earlier annotations, see code, pages 1126-7.—Ed.]

The legal fiction of the oneness of husband and wife has not been entirely effaced. All disabilities which the common law imposed upon husband and wife by reason of the marriage status still exist, except in so far as they have been modified

or changed by express statutory enactment. *Heacock v. Heacock*, 108-540.

Therefore, held that a wife cannot sue a husband on his personal contract made during coverture. *Ibid.*

**SEC. 3157. Conveyances to each other valid.**

[For earlier annotations, see code, pages 1127-9.—Ed.]

A postnuptial contract with reference to the wife's inchoate distributive share of the husband's estate which she would have been entitled to but for an antenuptial contract releasing such interest, may be valid. The hands of the husband and

wife are not to be tied up forever by an understanding entered into before learning fully of the mutual trust and confidence engendered by and essential to well being in the marriage relation. *Fisher v. Koontz*, 110-498.

**SEC. 3161. Attorney in fact.**

[For earlier annotations see Code, page 1130.—Ed.]

The wife cannot give the husband a power of attorney to dispose of her con-

tingent dower interest in his property. *Sawyer v. Biggart*, 114-489.

**SEC. 3162. Wages of wife—actions by.**

[For earlier annotations, see code, pages 1130-2.—Ed.]

In an action by a married woman for damages resulting from personal injuries, no recovery should be allowed for her loss of time in the absence of evidence that she had any business or employment apart from her husband. *Denton v. Ordway*, 108-487.

The husband is entitled to the services and earnings of his wife when she is not engaged in a business on her own account,

and in such case she cannot recover in her own name under implied contract for services rendered to a third person in furnishing him board and lodging. *McClintic v. McClintic*, 111-615.

But she may recover for board furnished under an express contract. *Lindsey v. Lindsey*, 89 N. W., 1096.

**SEC. 3164. Contracts of wife.**

[For earlier annotations, see code, page 1133.—Ed.]

A husband may contribute by his labor and sagacity to the accumulation of property in the name of his wife, without rendering such property subject to his debts. *Deere v. Bonne*, 108-281.

This provision as to suits by or against a wife on contracts made by or with her has reference to contracts with persons other than her husband, and does not authorize a suit by a wife against the husband on a contract entered into between them during coverture, not relating to her separate property. *Heacock v. Heacock*, 108-540.

Common law rules with reference to the oneness of husband and wife still so far exist that any capacity of a married woman to contract is regarded as exceptional, and the grounds therefor must be both alleged and proved by one seeking to recover. *Ibid.*

The wife, although not engaged in an occupation independent of her husband, may contract for furnishing board and maintain an action in her own name on such contract. *Lindsey v. Lindsey*, 89 N. W., 1096.

**SEC. 3165. Family expenses.**

[For earlier annotations, see code, pages 1133-5.—Ed.]

A diamond shirt stud worn by the husband for personal use and adornment is an expense of the family for which the wife may be liable. *Neasham v. McNair*, 103-695.

The wife does not become liable under this section for the support of her husband in an insane hospital, under the provisions of Code § 2297. *Blackhawk County v. Scott*, 111-190.

A creditor who has obtained judgment

against the husband for family expenses may, in an equitable action, subject the property of the wife to the payment thereof without first recovering judgment at law against her. *Boss v. Jordan*, 89 N. W., 1070.

In a suit to subject the property of the wife to the payment of a judgment against her husband for family expenses, the rights of one who purchased such property after the suit may be declared subject to plaintiff's claim. *Ibid.*

## CHAPTER 3.

## OF DIVORCE, ANNULING MARRIAGES AND ALIMONY.

## SECTION 3171. Jurisdiction.

[For earlier annotations, see code, pages 1135-6.—Ed.]

Where a decree of divorce was rendered on a notice by publication which gave the name of defendant with a spelling not the same, nor indicating the same pronunciation as that of defendant's true name, held, that there was no presumption in favor of the validity of such decree. *Hubner v. Reickhoff*, 103-368.

Mere length of time during which a

person has lived in a particular locality is not controlling in determining the length of residence. Intention is the controlling consideration. *Sylvester v. Sylvester*, 109-401.

The general rule that the domicile of the husband is the domicile of the wife does not apply in proceedings for divorce. *Ibid.*

## SEC. 3173. Verification—evidence—hearing.

[For earlier annotations, see code, page 1137.—Ed.]

The court should be prompt to denounce collusion between parties in an action to secure a decree of divorce, but in a particular case held that the evidence did not show such collusion as to authorize the court to refuse to hear a case submitted on petition and cross-petition. *Blinn v. Blinn*, 113-83.

A decree procured by one not in good faith a resident of this state is of no validity. *Roe v. McCaughan*, 113-274.

Where the husband procured a decree of divorce from his wife by fraud, held that

after his death the wife might maintain an action to set the decree aside in order to be entitled as his widow to draw a pension from the federal government. *Lawrence v. Nelson* 113-277.

In a case involving property rights, the presumption arising from a pretended marriage will not be sufficient to overthrow the presumption of the continuing validity of a former marriage, in the absence of any other evidence of a divorce. *Goodwin v. Goodwin*, 113-319.

## SEC. 3174. Causes.

[For earlier annotations, see code, pages 1137-41.—Ed.]

**Adultery.** A husband cannot have a divorce on account of the adultery of the wife with a third person who has such connection at the instigation of the husband for the purpose of securing evidence with a view to a divorce. *May v. May*, 108-1.

Evidence in a particular case held sufficient to establish adultery as a ground for divorce. *Bizer v. Bizer*, 110-248.

Evidence in a particular case held not sufficient to warrant a divorce on account of adultery. *Wells v. Wells*, 89 N. W., 98.

**Habitual drunkenness.** Occasional acts of intoxication are not sufficient to make one an habitual drunkard. There must be an involuntary tendency to become intoxicated as often as the temptation is presented, which comes from a fixed habit acquired from frequent and excessive indulgence. *Bizer v. Bizer*, 110-248.

**Inhuman treatment.** Divorce will only be granted on statutory grounds; and cruel and inhuman treatment will be a sufficient ground only where it is such as to endanger life. Whether a particular act or course of mistreatment is cruel and inhuman, and if so whether it is such as to endanger life, must be determined from the facts of each case, such as the temperament, disposition and mental and physical condition of the complaining party. *Blair v. Blair*, 106-269.

Cruelty provoked by the wrongful acts or unreasonable conduct of the wife will not entitle her to a divorce. *May v. May*, 108-1.

A divorce on the ground of cruel and inhuman treatment may be granted to the wife on account of conduct of the husband such as would tend to break down her nervous system and permanently impair her health. *Shook v. Shook*, 114-592.

There may be cruel and inhuman treatment which will be a ground for divorce, although the life of the wife has not been imperiled by physical acts of violence. *Berry v. Berry*, 88 N. W., 1075.

Evidence in a particular case held not sufficient to show such cruelty on the part of the husband as to entitle the wife to divorce, although the conduct of the husband was unmanly and even brutal, it appearing also that the conduct of the wife was not unexceptionable. *Sylvester v. Sylvester*, 109-401.

Facts in particular cases held not sufficient to show such cruel and inhuman treatment as to authorize the granting of a divorce. *Schaeffer v. Schaeffer*, 106-492; *Wells v. Wells*, 89 N. W., 98.

**Condonation.** The wife, by continuing to live and cohabit with the husband condones any previous acts of his which would have entitled her to a divorce. *May v. May*, 108-1.

**SEC. 3180. Alimony—custody of children—changes.**

[For earlier annotations, see code, pages 1143-6 —Ed.]

Where it appears that the testimony on which a decree for alimony in a proceeding for divorce is rendered on service by publication was false and untrue it should be set aside. *Klaes v. Klaes*, 103-689.

And held, that an attorney who was to receive a share of the judgment in such a case for his services was not an innocent purchaser of property awarded to the plaintiff in such a decree except to the extent to which he had actually made advances of money for expenses. *Ibid.*

The original decree is conclusive upon the parties as to their then circumstances, and the power to make changes in the decree is not a power to grant a new trial, or retry the same case, but only to adapt the decree to the newer circumstances of the parties. *Ferguson v. Ferguson*, 111-158.

Where the wife, suing for divorce and alimony, was denied divorce but given the custody of a child and an allowance for its support, held that such allowance was without authority, as there appeared to be no reason why the child should not remain with and receive support from the father. *Garrett v. Garrett*, 114-439.

Where the evidence was found not sufficient to sustain a decree for divorce, held that an allowance to the husband of plaintiff of alimony to the extent of one-third of the property of the wife was erroneous. *McDonald v. McDonald*, 90 N. W., 603.

Provisions as to alimony in a particular case sustained. *Casey v. Casey*, 88 N. W., 937.

**SEC. 3181. Forfeiture of rights.**

[For earlier annotations, see code, page 1146.—Ed.]

The guilty party forfeits all rights acquired by marriage, and this applies to the contingent dower interest in land conveyed

either before or after divorce. *Pollock v. Milburn*, 112-528.

## CHAPTER 4.

## OF MINORS.

**SECTION 3189. Contracts—disaffirmance.**

[For earlier annotations, see code, pages 1148-9.—Ed.]

A minor cannot be held liable for breach of promise, but may be held for seduction. *Wise v. Schloesser*, 111-16.

Although a minor cannot make a valid contract of marriage, nevertheless a prom-

ise of marriage by the defendant, a minor, may be shown in an action to recover damages for seduction. *Hawk v. Harris*, 112-543.

**SEC. 3190. Misrepresentations—engaging in business.**

[For earlier annotations, see code, page 1149.—Ed.]

If a minor engages in business as a merchant, and parties subsequently assume that he is of full age and deal with him in that belief, no inquiry or representation being made as to his minority, he becomes abso-

lutely liable for the debts contracted in such business, and he may be adjudged a bankrupt on his own petition, though still an infant. *In re Brice*, 93 Fed., 942.

## CHAPTER 5.

## OF THE GUARDIANSHIP OF PERSONS AND PROPERTY.

**SECTION 3192. Natural guardian.**

[For earlier annotations, see code, pages 1149-51.—Ed.]

A mutual understanding between parent and child is sufficient to constitute emancipation, and such understanding may arise by implication from the acts and conduct of the parties. *Kubic v. Zemke*, 105-269.

If, however, the parent still claims the right to the child's services during minority, whether he exercises the right to have them or not, there is no such emancipation as to free the parent from the obligation

the law creates to pay the necessary support furnished to the child by a third party. *Ibid.*

One who takes and raises a child to which he has no relationship, and which he does not adopt, does not become liable for medical services rendered to such child without his request. *Holmes v. McKim*, 109-245.

Parents are the natural guardians of their minor children, and as such may

accept the delivery of deeds made to them where the deeds are beneficial in their nature. *Hall v. Cardell*, 111-206.

The parent's right to the custody of the child, while recognized and allowed strong weight, is not absolute, and will not be enforced against the serious interests of the child. The child's vital welfare, present and future, is not sacrificed to the parent's claim. *Hadley v. Forrest*, 112-125.

### SEC. 3197. Bond and oath.

[For earlier annotations, see code, pages 1153-4.—Ed.]

A court of equity has jurisdiction to set aside a settlement and release of the guardian and his sureties on account of fraud in procuring the settlement. *Witt v. Day*, 112-110.

Under the circumstances of a particular

case held that the bondsmen in making settlement with the ward after attaining majority, had not exercised the good faith required, and that the settlement should be set aside. *Ibid.*

### SEC. 3200. Duties.

[For earlier annotations, see code, pages 1154-6 —Ed.]

The signing of a contract by the guardian for the ward under the direction of the probate court makes the contract as binding and conclusive with reference to the ward as though the ward had been an adult and executed such contract in person. *In re Harker's Estate*, 113-584.

A guardian cannot loan the money of his ward, lease his lands or invest his funds without an order of court. Such transactions are invalid, or at least voidable, until approved. *Easton v. Somerville*, 111-164.

One who has acquired a lien on the property of the ward by attachment proceedings is not by the subsequent appointment of a guardian compelled to look to the probate court for the enforcement of his rights. *Hawk v. Harris*, 112-543.

Under the provisions of the statute the guardian is not relieved from liability for

loss of funds invested, unless he acts under the direction of the court in making such investment. *Van Rees v. Witzenburg*, 112-30.

Settlements by a guardian with his ward out of court are not favored, and one who relies on such settlement must clearly show that he made full disclosure of everything, and that the ward knew and understood that he was making a full and final settlement. Every reasonable intendment is to be made in favor of the ward. *Ibid.*

Where a guardian makes final report and his liability is adjudicated, such adjudication is binding on his sureties, and they are not entitled to relief on the ground that the guardian, under mistake as to his duties and liabilities, has made a report showing a greater liability than that actually existing. *Steiner v. Lenz*, 110-49.

### SEC. 3201. Breach of bond—new guardian.

[For earlier annotations, see code, page 1156.—Ed.]

A failure to account to the ward when he reaches his majority is a breach of obligation under the guardian's bond, and a right of action then accrues to the ward, and the statute of limitations begins to run. The running of the statute cannot be postponed by failure of the ward to make demand for an accounting. *Ackerman v. Hülpert*, 108-247.

In the absence of any actual accounting or settlement, the guardian is not discharged by a written release from the ward, and a discharge pursuant to such re-

lease is not an adjudication. Such discharge may be set aside without proof of actual fraud. *Ellis v. Soper*, 112-631.

While the mother as guardian may not be bound in all events to support the child out of her own means, in the absence of an allowance by the court from the property of the ward in her hands, nevertheless, where she has ample means she should not be allowed to encroach on the estate of the child, though she may set off the support of her child as against a claim for an accounting for interest. *Ibid.*

### SEC. 3205. Compensation.

[For earlier annotations, see code, pages 1156-7.—Ed.]

Where the guardian does not do his full duty in notifying his wards of their right to moneys in his hands, and wrongfully mingles the trust fund with his own, he

may be charged with interest thereon at six per cent., with annual rents. *Blakeney v. Wyland*, 89 N. W., 16.

**SEC. 3219. Guardians of drunkards, spendthrifts and lunatics.**

[For earlier annotations, see code, pages 1161-2.—Ed.]

It seems that a person is of unsound mind when so weak and infirm mentally as not to be capable of exercising the judgment necessarily required in the management of his ordinary affairs. *Garretson v. Hubbard*, 110-7.

Under the facts in a particular case held that there was not sufficient showing of mental incapacity to authorize the appointment of a guardian. *Alvord v. Alvord*, 109-113.

**SEC. 3225. Real estate sold—allowance to family.** Whenever the sale or mortgage of the real estate of such ward is necessary for his support, or for the support of his family or the payment of his debts, or will be for the interest of the estate or his children, the guardian may sell or mortgage the same under like proceedings as required by law to authorize the sale of real estate by the guardian of the minor. The court shall, if necessary, set off to the wife and minor children of the insane person, or to either, sufficient of his property, of such kind as it shall deem appropriate, to support them during the period such person is insane. [26 G. A., ch. 54; 22 G. A., ch. 70; C. '73, § 2276; R., § 1453.] [29 G. A., ch. 131, § 1.]

[For annotations, see code, page 1163.—Ed.]

**SEC. 3227. When estate is insolvent.**

Any control which the probate court acquires over property of the ward by the appointment of the guardian is subject to

an attachment on such property already levied in another proceeding. *Hawk v. Harris*, 112-543.

## CHAPTER 7.

## OF ADOPTION.

**SECTION 3252. Instrument acknowledged and recorded.**

[For earlier annotations, see code, page 1166.—Ed.]

Statutes of adoption are in derogation of the common law and are to be strictly construed. *Bresser v. Saarman*, 112-720.

The recital that the natural parent fully and voluntarily consents to the adoption of the children by husband and wife named as adopting parents is effectual. *Ibid.*

Where the acknowledgment of an instrument of adoption was by a justice of the peace of another state, without the genuineness of his signature being shown by an accompanying certificate, and the instrument thus defectively acknowledged

was recorded, held that the recording thereof was legalized by a subsequent statute curing defects in the recording of instruments defectively acknowledged. *Ibid.*

Indexing an instrument for the adoption of a minor under the name of the adopting parents and also that of the adopted child is sufficient. Indexing is not essential to the validity of the instrument, and the omission of the recorder to index it exactly as provided in the statute will not render it invalid. *Hilpire v. Claude*, 109-159.

**SEC. 3253. Effect.** Upon the execution, acknowledgment and filing for record of such instrument, the rights, duties and relations between the parent and child by adoption shall be the same that exist by law between parent and child by lawful birth, and the right of inheritance from each other shall be the same as between parent and children born in lawful wedlock. [C. '73, § 2310; R., § 2603.] [29 G. A., ch. 132, § 1.]

[For earlier annotations, see code, page 1167.—Ed.]

The adoption of a child operates like the subsequent birth of a legitimate child to revoke a will previously executed. It appears to be the legislative intention to

place adopted children upon the same level as children of lawful birth. *Hilpire v. Claude*, 109-159.

## CHAPTER 8-A.

OF THE CARE OF FRIENDLESS CHILDREN AND THE ESTABLISHMENT, REGULATION  
AND VISITATION OF HOMES FOR.

**SECTION 3260-a. Repeal.** That chapter eight (8) of title sixteen (16) of the code be and the same is hereby repealed, and the following enacted in lieu thereof. [29 G. A., ch. 133, § 1.]

**SEC. 3260-b. Powers of societies.** Any society legally incorporated under the laws of the state of Iowa for the purpose of receiving, caring for, placing out for adoption, or in any way improving the condition of abandoned, abused, ill-treated, friendless, or orphan children, may receive, control and dispose of such minor children under the provisions of this act; and such corporation shall be the legal guardian of the persons of all children so surrendered to it, and may exercise all the rights and authority of the parents of such children in regulating the apprenticing and adoption thereof. [29 G. A., ch. 133, § 2.]

**SEC. 3260-c. Surrender of children to.** Children may be surrendered to such society by the father and mother jointly; by either father or mother, when the other is dead, or hopelessly insane, an habitual drunkard, has abandoned his family, is in prison for crime, or is an inmate or keeper of a house of ill fame; by the mother alone if the child is illegitimate and in her care and custody; by any court of record or judge thereof, or any mayor, or justice of the peace in the county of the residence of such children or their parents, upon complaint made and proceedings had thereon as hereinafter provided. [29 G. A., ch. 133, § 3.]

**SEC. 3260-d. Commitment.** Whenever it shall be made to appear to any court, judge, mayor, or justice of the peace, as above provided, that any child within his jurisdiction, by reason of orphanage, or neglect, abuse, crime, drunkenness, or gross immorality of one or both of the parents, or other persons having custody of such child, is abandoned, ill-treated, or friendless, or in circumstances tending to induce such child to lead a dissolute, immoral or vicious life, then it shall be the duty of such court or magistrate to take such child away from its parents or those having control thereof, and commit it to some society incorporated for that purpose, or to some other person or guardian, as may seem to be for the best interests of such child, and the society or person so adopting shall be required to keep such child if over seven (7) years of age and under fourteen (14) years of age in school during the school sessions of the school district in which said child is kept or in some parochial school for like period. [29 G. A., ch. 133, § 4.]

**SEC. 3260-e. Written complaint—appeal.** All proceedings under section four (4) of this chapter shall be by written complaint duly verified, which complaint shall state the cause of action and the relief asked. If it shall appear that such child is in the custody and control of parents, guardians, or other persons, such parents, guardians, or other persons shall be served with a copy of said complaint, and such notice of the time and place of the hearing thereof as may be ordered by the court or magistrate by whom the case is to be tried; which notice and copy shall be served in the same manner as is provided in the service of original notices. An appeal may be taken to the district court from the order of a magistrate at any time within twenty (20) days thereafter, in the same manner as appeals are taken from judgments in justice courts, except that no bond shall be required to stay proceedings. [29 G. A., ch. 133, § 5.]

**SEC. 3260-f. Custody of child during trial.** Upon filing of proper complaint, the magistrate may, if thought best, issue a warrant directed to the sheriff or other peace officer, requiring such peace officer forthwith to take into his custody the child described in such complaint, and to retain pos-

session of it subject to the order and direction of the court. [29 G. A., ch. 133, § 6.]

**SEC. 3260-g. Religious faith.** The court or magistrate in committing children, shall place them as far as practicable in the care and custody of some individual holding the same religious belief as the parents of said child, or with some association which is controlled by persons of like religious faith as the parents of said child; and when any home or society shall dispose of the custody of any child, it shall be, as far as practicable, to some person of the same religious faith as its parents, unless the parents or former guardian otherwise consent. [29 G. A., ch. 133, § 7.]

**SEC. 3260-h. Habeas corpus.** Upon the hearing of any habeas corpus proceedings for the custody of any such child, if it appears that it has been surrendered to the home under the provisions of this chapter, such fact shall be presumptive evidence that it was done properly and that said home was entitled to the custody and guardianship thereof. [29 G. A., ch. 133, § 8.]

**SEC. 3260-i. Proceedings—county attorney to prosecute—court costs.** Proceedings under this act may be brought by any citizen of the state, acting by himself or his attorney. It shall be the duty of the county attorney, when requested, to prepare complaints and prosecute all such cases in behalf of the complainants. Court costs shall be taxed the same as in criminal actions. [29 G. A., ch. 133, § 9.]

**SEC. 3260-j. Board of control to have supervision—annual reports—financial statement.** All associations or societies receiving children under this act shall be under the supervision of the board of control of state institutions and shall be subject to visitation by the board of control, its members, or agents, which may require such information and statistics from such associations as the board shall deem necessary, in order to enable it to exercise proper supervision over them. Every such association shall file with the state board of control, during the month of January of each year, an annual written or printed report, which shall include a statement of the number of children cared for during the preceding year, the number of children received for the first time and the number returned from families, the number placed in homes, the number deceased, the number returned to friends, and the number placed in state institutions, the number and names and number of months of each of those attending school; also a financial statement showing the receipts and disbursements of such association. The statement of the disbursements shall show the amount expended for salaries and other expenses, specifying the same, and the amount expended for lands, buildings, and investments. And no child shall be committed to the care of any association which shall not have filed a satisfactory report for the calendar year last preceding with the state board of control, unless it be a society organized within the current year. [29 G. A., ch. 133, § 10.]

**SEC. 3260-k. Jurisdiction to revoke.** The district court of any county in which any society or home may be located shall have jurisdiction to revoke the powers herein granted upon a showing that any such society or person has abused the trust imposed in such society or person, or that the welfare of its wards demands that they be taken from the control of such society or person. It shall be the duty of the state board of control to institute such proceedings whenever, in its judgment, they are advisable. [29 G. A., ch. 133, § 11.]

**SEC. 3260-l. Associations of other states.** No association which is incorporated under the laws of any other state than the state of Iowa shall place any children in any family home within the boundaries of the state of Iowa, either with or without indentures, or for adoption, unless the said association shall have furnished the state board of control with such guaran-

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tee as it may require, including an indemnity bond in favor of the state of Iowa in the penal sum of one thousand (1,000) dollars, that no child shall be brought into the state of Iowa by such society or its agents, having any contagious or incurable disease, or having any deformity, or being of feeble mind, or of vicious character, and that said association will promptly receive and remove from the state any child brought into the state of Iowa by its agents, which shall become a public charge within the period of five (5) years after being brought into this state. Provided, that this act shall not be construed as prohibiting any person residing in Iowa from receiving and adopting into his family any child or children from another state. [29 G. A., ch. 133, § 12.]

**SEC. 3260-m. Appropriations.** To provide for the expenses of the inspection herein required, there is hereby appropriated the sum of one thousand dollars (\$1,000.00) or so much thereof as may be necessary, from any funds of the state treasury not otherwise appropriated. [29 G. A., ch. 133, § 13.]

## TITLE XVII.

### OF THE ESTATE OF DECEDENTS.

#### CHAPTER 1.

##### OF THE PROBATE COURT.

#### SECTION 3261. Always open—hearing.

[For earlier annotations, see code, page 1169.—Ed.]

No provision is made for a jury trial on an application for an order as to the distribution of the estate. *Duffy v. Duffy*, 114-581.

An order in a matter of guardianship, made by consent of parties in another

county, but subsequently entered on the records of the county where the matter is pending, is valid, and is binding on the guardians and the sureties on his bond. *Steiner v. Lenz*, 110-49.

#### SEC. 3265. Extent of jurisdiction.

[For earlier annotations, see code, page 1169.—Ed.]

If deceased is a resident of the state at the time of his death, jurisdiction over his estate is exclusively in the district court of the county of his residence; if a non-resident of the state, then in the court of any county where there was property or estate subject to administration. In the latter case the jurisdiction of the court first assuming jurisdiction is exclusive, and in either case the jurisdiction acquired is co-extensive with the state. *McFarland v. Stewart*, 109-561.

The court first exercising jurisdiction to appoint an administrator will retain such jurisdiction to the end of the proceeding unless want of jurisdiction appears of record. *Nash v. Sawyer*, 114-742.

In a proceeding to establish the right to a share in the estate, the amount of indebtedness of the same person to the estate may be adjudicated. *Prouty v. Matheson*, 107-259.

#### CHAPTER 2.

##### OF WILLS AND LETTERS OF ADMINISTRATION.

#### SECTION 3270. Disposal of property by will.

[For earlier annotations, see code, pages 1170-3.—Ed.]

**Form and interpretation.** No particular form is required for a will. The main object of the court is to learn the intention of the maker. The intention being known, all artificiality of language, or looseness of construction must yield to and be governed by it. To ascertain whether the instrument was intended to create a testamentary gift, collateral evidence may be received if the terms of the writing are not clear. *In re Est. of Longer*, 108-34.

An unconditional devise of all of testator's property to his widow, with full power to sell and convey, vests in the widow a fee title, although the will contains subsequent directions as to the division of the property remaining at her

death, or in case of her remarriage. *Hambel v. Hambel*, 109-459.

An instrument in a particular case in the form of a deed, granting land subject to occupancy and possession of grantor during life, with a provision that it should be of no force until after the death of the grantor, held to be a conveyance, and not an attempted will. *Saunders v. Saunders*, 88 N. W., 329.

An instrument which operates to convey a present interest, although possession and enjoyment are reserved during the life of the grantor, may be effective as a conveyance, but if it passes no present interest, and is to be operative only upon the grantor's death, then it is testamentary in character and of no effect, unless executed

with all the formalities of a will. *Tussie v. Raish*, 90 N. W., 66.

Therefore held that an instrument granting an interest in property, which was to vest at the grantor's death without children, and after payment of debts, funeral expenses, etc., was testamentary in character. *Ibid.*

**Testamentary capacity and undue influence.** The line between competency and incompetency is always drawn with uncertainty and the findings on that question in most cases are justified only as the best solution of a doubtful problem. *In re Allison's Estate*, 104-130.

Testamentary incapacity does not necessarily require that a person shall actually be insane or of unsound mind. The testator may be incapable of making a valid will on account of weakness of mind not amounting to insanity. *Manatt v. Scott*, 106-203.

It seems that a person is of unsound mind when so weak and infirm mentally as not to be capable of exercising the judgment necessarily required in the management of his ordinary affairs. *Garretson v. Hubbard*, 110-7.

Although the testator's mind be clouded, if he is capable of comprehending his property interests and of determining what disposition he desires to make of his property, and of making such disposition, he has testamentary capacity. *In re Evans' Estate*, 114-240.

Mere weakening of mental power will not render a person incapable of executing a will. So long as he retains mind enough to know and comprehend in a general way the natural objects of his bounty, the nature and extent of his estate, and the disposition which he is to make of it, it is not necessary that he should be competent to make contracts or transact business generally. Old age and failure of memory do not of themselves necessarily take away a testator's capacity to make a will, nor will the exclusion of some or all of the testator's legal heirs from the benefits of the will be sufficient evidence of incapacity. *Perkins v. Perkins*, 90 N. W., 55.

Undue influence, rendering the will invalid, must be such as subjects the will of the testator to that of the person exercising such influence, and makes the paper express the purpose of such person, rather than that of the testator himself. And such undue influence must be directly connected with the execution of the will, and operating at the time it was made. *Ibid.*

**Evidence.** A witness, one of the persons unfavorably affected by a will, may testify to unfriendliness on the part of testator before the execution of the will. *Manatt v. Scott*, 106-203.

Declarations made by testator are admissible as bearing on capacity and undue influence, even though made long after

the execution of the will, if they tend to show senile dementia which in its nature is progressive. *Ibid.*

A question as to actions or appearances indicating mental strength or weakness calls for a fact and not an opinion. *Ibid.*

The inequalities of a will may be taken into consideration in determining the mental capacity of the testator or whether undue influence has been exercised, but apparent inequality or inequity in the provisions of a will does not alone warrant the presumption of mental incapacity or undue influence. These may be considered only as circumstances in connection with other facts bearing on the condition of the testator's mind. *Ibid.*

What is meant by unjust, unreasonable and unnatural provisions of a will is that they are not as persons in like situation and similar relationship ordinarily and usually make them. *Ibid.*

Where testatrix had preferred some of her brothers to her natural heirs, it was held material in looking into the equities of the will to know that in remembering those mentioned she forgot other brothers and sisters in needy circumstances. The fact that the will bestows property on the wealthy and overlooks the claims to bounty of those who are poor, in like relationship, is a circumstance suggesting a disordered mind or the working of sinister influences. *Ibid.*

The presumption of want of capacity arising from the appointment of a guardian may be overcome by evidence as to the condition and acts of testator at the time of making or revoking the will. *Linkmeyer v. Brandt*, 107-750.

A subscribing witness may state his belief as to the testator's condition of mind without first showing grounds on which that belief is based. *Furlong v. Carraher*, 108-492; *Hertrich v. Hertrich*, 114-643.

Testator's previous declarations are admissible in support of a will which is impeached on the ground of want of mental capacity. *In re Perkin's Estate*, 109-216.

Also it is proper to permit those contesting the will to show the amount of advancements made to them for the purpose of rebutting evidence of declarations claimed to have been made by testator on the subject tending to support the will. *Ibid.*

For the same purpose entries in deceased's books of account are admissible as tending to show the amount of advancements as bearing on his state of mind with reference to the persons to whom the advancements appear to have been made. *Ibid.*

Evidence in a particular case considered and held not to be sufficient to overcome the presumption in favor of sanity or

soundness of mind on the part of testator. *Howe v. Richards*, 112-220.

It is not proper to ask an expert whether testator was competent to make a will, this being the ultimate fact for the jury to determine. *In re Betts' Estate*, 113-111.

It is not for a witness, though an expert, to say what will constitute mental capacity. Nor should such expert be allowed to testify as to the effect of mental capacity upon the validity of a will. *Marshall v. Hanby*, 88 N. W., 801.

The burden of establishing testator's mental capacity, or the existence of undue influence for the purpose of defeating the probate of a will, is throughout upon contestant, save when because of the peculiar relations between the testator and beneficiary it is incumbent on the beneficiary to explain such relations in order to overcome the presumption of undue influence arising therefrom. But the inference to be drawn from the instrument itself is never merely to cast the burden upon contestant in ascertaining its validity. *Ibid.*

There must be some showing as to the due execution of the will before contestant is put on his proofs. But this showing may be sufficiently made by the contesting witnesses. The burden of proving want of mental capacity and undue influence is upon the contestants, and as a general rule does not shift. *In re Goldthorp's Estate*, 88 N. W., 944.

It is not necessary in the original evidence in behalf of proponents to introduce witnesses in support of the sanity of testator. *In re Hull's Will*, 89 N. W., 979.

One who shows an acquaintance with

the person whose mental capacity is in question and a familiarity with his conduct, may testify affirmatively that in his opinion such a person was of sound mind, while an opinion that such person was of unsound mind must be based on facts consisting of particular acts or conduct indicating unsoundness. *Ibid.*

An obituary notice in which statements are made as to the mental capacity of testator, although published under the sanction of relatives who afterwards contest the will, is not admissible for the purpose of showing mental capacity. *Ibid.*

While the fact that the will is unreasonable or unjust may be considered in connection with evidence bearing on the condition of testator's mind, it is not alone a ground for refusing probate. *In re Trotter's Will*, 90 N. W., 750.

Devise in lieu of dower. Under the provisions of the Code of '73, held that the creation of a trust of testator's entire property for the purpose of raising a fund for the widow's support and use during life was inconsistent with the dower right of the widow in the property. *Campbell v. Sankey*, 114-69.

Also held that the devise to a wife of a life estate in all of testator's property, in the absence of any restrictive words, was not to be construed as made in lieu of dower. This rule of construction is now changed by the language of this section. *Percifield v. Aumick*, 89 N. W., 1101. And see notes to Code § 3376 in this Supplement.

Section applied. *Newberry v. Newberry*, 114-704.

### SEC. 3274. In writing—witnessed—signed.

[For earlier annotations, see code, pages 1174-75.--Ed.]

Where subscribing witnesses are dead or beyond the jurisdiction of the court, proof of their handwriting is a compliance with the law as to proving execution, and where they are beyond the jurisdiction of the court, even though their depositions are taken and introduced, other evidence of the due execution of the will is admissible. *In re Allison's Estate*, 104-130.

Where the subscribing witnesses are dead, other evidence of the execution of the will is admissible. *Scott v. Hawk*, 105-467.

Evidence that the deceased, upon examination of the instrument and the signatures thereto, declared it before his death to be his will, may be introduced to prove execution in such a case. *Ibid.*

The making of a mark by a testator will satisfy the statutory requirement as to signature, even though the testator is able to write at the time. *Scott v. Hawk*, 107-723.

If the statute is complied with, nothing more in the execution of the will is nec-

essary. Publication, as such, is not required. *Ibid.*

The testamentary right to dispose of property is regulated by the statute which to have been so witnessed, it will not be requires the will to be witnessed in a certain way, and where it does not appear valid although it is shown that there were other competent witnesses present at the execution. *McCarn v. Rundall*, 111-406.

If testator asks a person who is competent to be a witness to attest the will, and the person thus requested, instead of attesting in the usual way as a witness, affixes a certificate of acknowledgment thereto, the will is sufficiently witnessed by him. *In re Hull's Will*, 89 N. W., 979.

The attesting clause is not essential to the sufficiency of the attestation by witnesses, though it may be important in furnishing proof that the testator declared the instrument to be his act, and that the witnesses signed it in his presence. If there is an attestation clause showing the requisite facts, signed by two witnesses, this is *prima facie* sufficient, but the proof

furnished by such clause is not conclusive. *Ibid.*

It is sufficient that the witness sign in the presence of testator in response to a request of a third person, made by the testator's direction, approved by some sign or act on the part of the testator, and that the signature of the witnesses is with the knowledge of the testator, and in response to such request. Indeed, it is sufficient if the signing is in the presence of tes-

tator, with knowledge on his part that the witnesses are signing in response to a request of the third person, he making no objection. *Ibid.*

It is not essential that the witnesses attest with reference to one and the same act or declaration of the testator. *Ibid.*

The burden of proof as to due execution and attestation is on the proponents. *Ibid.*

Questions as to the sufficiency of the attestation are for the jury. *Ibid.*

### SEC. 3276. Revocation—cancellation.

[For earlier annotations, see code, page 1175.—Ed.]

While a presumption of want of capacity to make a valid revocation may arise from proof that testator was then under guardianship, such presumption may be overcome by evidence. *Linkmeyer v. Brandt*, 107-750.

The adoption of a child in the manner authorized by statute has the same effect as the subsequent birth of a legitimate child in operating to revoke a will previously executed. *Hilpire v. Claude*, 109-159.

A revocation of a will by destruction is effectual, notwithstanding a subsequent will is held invalid for want of mental capacity. *McCarn v. Rundall*, 111-406.

To defeat the revocation in such case it must appear that there was want of mental capacity at the time of the destruction of the first will. *Ibid.*

Proof of the contents of a destroyed will ought to be of the clearest and most satisfactory character. *Ibid.*

The whole will is not rendered void by an attempt in an unauthorized manner to change one of its provisions. Where the alteration is not attended with the formalities required by statute, it is of no effect, and unless it is impossible to determine what the original will was, it remains the will of the testator. *In re Hull's Will*, 89 N. W., 979.

### SEC. 3281. Heirs of devisee.

[For earlier annotations, see code, page 1176.—Ed.]

The provisions of this section apply as well to a devise to a class as to an individual, but such a statute does not apply

where the devise is to a class to be determined only when the will takes effect. *In re Nicholson's Will*, 88 N. W., 1064.

### SEC. 3283. Probate—jury trial.

[For earlier annotations, see code, pages 1176-7.—Ed.]

**Contest.** The widow has no such interest in the estate as entitles her to contest the probate of a will. *In re Will of Fallon*, 107-120.

Executors not otherwise interested in the will cannot protest the probate of a codicil revoking their appointment. Such action is only allowable to one who would have a beneficial interest in the estate if there was no will. *In re Estate of Stewart*, 107-117.

Devisees are entitled to nothing save under the probated will and cannot contest the validity of a probate. *Seery v. Murray*, 107-384.

**Procedure.** A written petition for the probate of a will is not necessary to give the court jurisdiction. *Ibid.*

The question of the sufficiency of the attestation, where there is a conflict in the evidence, is for the jury. *In re Hull's Will*, 89 N. W., 979.

**SEC. 3287. Will—recorded—executor to have copy.** After being proved and allowed, the will, together with the certificate hereinbefore required, shall be recorded in a book kept for that purpose, and the clerk shall cause the same, or an authenticated copy thereof, to be placed in the hands of the executor therein named or otherwise appointed. And whenever it shall appear that the testator died seized of real estate located in a county of this state other than that in which probate is granted, a complete transcript, properly authenticated, and of the record entry of the order of court admitting the will to probate, and if a copy of such will is not contained therein a certified copy of such will shall be attached thereto and the same shall be filed by the clerk in the office of the clerk of the district court in such other county, who shall cause the same to be entered in the probate docket, and

said transcript shall be recorded in full in the book kept for the recording of wills in such county, and when so recorded such record may be read in evidence in all courts without further proof. The cost of such transcript and of the recording thereof shall be taxed against the estate of the decedent unless administration thereof is closed, in which event it shall be paid by the owner of the real estate involved. [C. '73, §§ 2343-4; R., §§ 2327, 2330; C. '51, §§ 1295, 1298.] [29 G. A., ch. 134, § 1.]

[For annotations, see code, page 1178.—Ed.]

**SEC. 3295-a. Sale of real estate by foreign executors—made legal.**

All conveyances of real property heretofore executed by executors or trustees under foreign wills and prior to the expiration of three months after the recording of a duly authenticated copy of the will, original record of appointment, qualification, and bond, as required by chapter 162, acts of the eighteenth general assembly, are hereby legalized and declared as valid and effectual in law as though the provisions of said chapter had been strictly followed, provided the proper proof of authority was a matter of record in the office of the clerk of the district court in the county where the real property is situated, at the time the conveyance was executed, or was so made a matter of record prior to the passage of this act; provided, nothing in this act shall in any manner affect pending litigation. [27 G. A., ch. 182, § 1.]

**SEC. 3297. Administration granted.**

[For earlier annotations, see code, page 1182.—Ed.]

The right to administer upon the estate to entitle her to protest the probate of a does not give the widow such interest as will. *In re Will of Fallon*, 107-120.

**SEC. 3300. Inventory—preservation of property.**

[For earlier annotations, see code, pages 1182-3.—Ed.]

A special administrator has no power to submit a claim against the estate to arbitration. He has nothing to do with the allowance of claims. *Sullivan v. Nicoulin*, 113-76.

**SEC. 3301. Bond—oath.**

[For earlier annotations, see code, pages 1183-4 —Ed.]

Both principal and sureties are estopped from denying the validity of the appointment and insisting that the court had not jurisdiction of the estate. *Nash v. Sawyer*, 114-742.

make him executor in fact upon the testator's death, but ordinarily gives him the right only to become such by compliance with the provisions of the statute. *Burlington Prot. Hosp. Assn. v. Gerlinger*, 111-293.

Naming a person as executor does not

**SEC. 3303. Letters.**

[For earlier annotations, see code, pages 1184-6.—Ed.]

**Appointment of administrator.** The validity of the appointment of an administrator can only be raised in a direct proceeding and cannot be collaterally questioned. *Seery v. Murray*, 107-384.

The court may appoint an administrator without written application. A petition is not necessary to give the court jurisdiction. *Ibid.*

**Powers.** The executor cannot be said to be interested in the estate and cannot contest the probate of a codicil. *In re Estate of Stewart*, 107-117.

An administrator may not, in the absence of statutory authority, bind the es-

tate by his contract, even when, in performing the duties of administration, expenses are necessarily incurred for services rendered or purchases made, but parties with whom the administrator deals must look to him personally for compensation, and no action therefor can be maintained against the estate, though the claim be valid. *Valley Nat. Bank v. Crosby*, 108-651.

Parties have been permitted to maintain equitable actions on contracts with the administrator directly against the estate where, because of his insolvency, or some other sufficient reason, their remedy against him is inadequate, but this is

always based on a *quantum meruit*, or benefit received by the estate. *Ibid.*

An administrator cannot make a binding contract as to the fee to be paid to an attorney for prosecuting a claim for injuries causing the death of deceased. *Rickel v. Chicago, R. I. & P. R. Co.*, 112-148.

It is doubtful whether an administrator or executor, without the court's approval, has any power to submit controversies as to claims against the estate to arbitration. *Sullivan v. Nicoulin*, 113-76.

The administrator of an estate may maintain an action against decedent's grantee to set aside a conveyance, if in

fraud of decedent's creditors. *Mallow v. Walker*, 88 N. W., 452.

**Actions against.** A judgment against an executor who has been discharged is of no validity unless against him personally. *Applegate v. Applegate*, 107-312.

An administrator who is entitled to a share in the property of the estate cannot be garnished for such share in order to subject it to the payment of a debt due by him personally. In such case equitable proceedings to subject the property to the payment of his debt may be maintained. *Cassady v. Grimmelman*, 108-695.

### SEC. 3304. Notice of appointment.

[For earlier annotations, see code, page 1186 —Ed.]

The fact of publication is not in itself sufficient to give rise to the presumption that the proper order or direction was

made by the clerk. *McConaughy v. Wilsey*, 88 N. W., 1101.

### SEC. 3306. Foreign administration.

[For earlier annotations, see code, page 1187 — Ed.]

Funds which have been sent into the state for investment by an agent and have thus become subject to taxation, as provided in Code § 1520, continue to be taxable

here until removed from the state in the process of administration. *In re Miller's Estate*, 90 N. W., 89.

## CHAPTER 3.

### OF THE SETTLEMENT OF ESTATES.

#### SECTION 3313. Life insurance—damages for death—widow deemed heir.

[For earlier annotations, see code, page 1190.—Ed.]

Money recovered for the death of a person leaving a father and mother, and no wife or child, immediately descends to the father and mother in equal shares, and their interest therein may, after the payment of the judgment into court, be applied in payment of a judgment against them. *Cassady v. Grimmelman*, 108-695.

Although Code § 2403 forbids the sale of intoxicating liquors to an habitual drunkard or to an intoxicated person, and § 2448 subjects one who makes such sales to forfeiture, the administrator of the estate of one who dies by reason of purchasing and

drinking liquor sold to him in violation of these provisions cannot maintain an action against the seller of the liquor to recover for the estate damages for causing the death of the person to whom the liquor was sold. *Bissell v. Starzinger*, 112-266.

Where the policy or certificate provides for the payment of the insurance money to the "legal heirs" of insured, the amount due in case of loss does not belong to the estate of the decedent, and the administrator of his estate is not entitled to recover. *Schoep v. Bankers' Alliance Ins. Co.*, 104-354.

#### SEC. 3314. Allowance to widow and children.

[For earlier annotations, see code, page 1191.—Ed.]

The claim of the widow for allowance of support is contingent and uncertain until judicially determined, and her claim there-

to abates with her death. *Zunkel v. Colson*, 109-695.

#### SEC. 3315. Discovery of assets.

[For earlier annotations, see code, pages 1191-2.—Ed.]

An appeal will lie from an order made under a statutory provision in relation to the examination of one claimed to have in his possession the effects of the deceased,

and likewise from an order granting a retrial in such a proceeding. *In re Behren's Estate*, 104-29.

**SEC. 3323. Sale of real estate—application.**

[For earlier annotations, see code, pages 1193-4.—Ed.]

On an application for sale of real property it may be shown by way of resistance that personal property belonging to the estate is not inventoried and is in the hands of the administrator and would be sufficient to pay the debts without resort-

ing to the real estate. *Duffield v. Walden*, 102-676.

Although there is no showing as to the disposition of the personalty, an order for the sale of realty, although irregular, will not be void. *Cheney v. McColloch*, 104-249.

**SEC. 3328. Bond to prevent sale.**

[For earlier annotations, see code, page 1196.—Ed.]

This section has no application to an action by an heir to recover property of

the estate taken by a devisee. *Seery v. Murray*, 107-384.

**SEC. 3333. Possession of real property.**

[For earlier annotations, see code, pages 1197-8.—Ed.]

An administrator has no claim for injuries done to the land belonging to the deceased, and cannot sue as such for trespass. *Hook v. Garfield Coal Co.*, 112-210.

In an attachment suit by a wife against her non-resident husband, her administrator on her death is not entitled to intervene. *Samis v. Hitt*, 112-664.

If the administrator has any power to borrow money for keeping up the condition of the real property, such power is limited to cases where due notice has been given to those entitled to the estate, and the liability of the estate is limited to the benefits received. *Valley Nat. Bank v. Crosby*, 108-651.

**SEC. 3336. Provisions of will.**

[For earlier annotations, see code, page 1198.—Ed.]

Testator may direct the delivery of a deed after his death on the performance of specific conditions and the delivery of such deed by the executor on performance of the conditions will be sufficient to pass

title. So held where a grantee named in a deed had before the death of testator made part payment under a contract to convey. *Dettmer v. Behren*, 106-585.

**SEC. 3338. Claims—statement—notice—allowance.**

[For earlier annotations, see code, pages 1199-1202.—Ed.]

While a judgment against one who is since deceased may be enforced against the real estate upon which it is a lien without filing it as a claim against the estate, yet this must be done while the judgment lien exists. *Hansen's Empire Fur Factory v. Teabout*, 104-360.

The mere withdrawal of a claim for the purpose of preparing a petition thereon does not amount to an abandonment of such claim. *Clough v. Ide*, 107-669.

The probate court has not exclusive jurisdiction of proof of claims against an estate, and judgment in an action in the district court against the administrator, prosecuted without objection, will be a prior adjudication and defeat a subsequent recovery in a probate court. *Ibid.*

In presenting a claim against an estate it is not necessary for the claimant to

state its legal capacity to sue as a corporation, and denial of corporate capacity must be specific. *University of Chicago v. Emmert*, 108-500.

A remedy has sometimes been allowed against the estate on contracts made by the administrator where, by reason of his insolvency, or some other sufficient reason, a remedy against the administrator personally is inadequate, but the allowance is limited to the value accruing to the estate. *Valley Nat. Bank v. Crosby*, 108-651.

The estate cannot be bound by the contract of the administrator with reference to the attorney fee to be paid to an attorney who prosecutes a claim in behalf of the estate against a railroad company for injuries causing the death of decedent. *Rickel v. Chicago, R. I. & P. R. Co.*, 112-148.

**SEC. 3340. Denial.**

[For earlier annotations, see code, page 1202.—Ed.]

The burden of proof, if the claim be unpaid, is on the estate. It is not necessary for the claimant to show attempts to collect, nor to show a *prima facie* right to recover. *Murphy v. McCarthy*, 108-38.

The burden is upon the administrator to show a satisfaction of a claim based on a written instrument purporting to bind deceased. *University of Chicago v. Emmert*, 108-500.

Prior to the adoption of the present Code there was no provision for pleading special defenses to a claim against the estate.

*Benton County Sav. Bank v. Strand*, 106-606.

### SEC. 3341. Hearing—trial by jury.

[For earlier annotations, see code, pages 1202-3.—Ed.]

The county court originally exercised probate jurisdiction without jury trial, except in cases where jury trial was expressly provided for. Such jurisdiction was subsequently transferred to the circuit court and afterwards to the district court, but nothing in the acts changing the forum indicates a legislative purpose to change the mode of trial except in par-

ticular cases where jury trial is especially provided for. *Duffield v. Walden*, 102-676.

An order of court allowing a claim is in the nature of an adjudication and a party is not entitled to have it set aside and to have a retrial as to the validity of the claim as a matter of right, but must show some ground for setting it aside. *Hendron v. Kinner*, 110-544.

### SEC. 3343. Contingent liabilities.

Section applied as to contingent claims. *In re Allen's Estate*, 88 N. W., 1091.

### SEC. 3344. Referees.

In view of this provision for reference by a court, it is doubtful whether an administrator or executor, without the court's

approval, has any power to submit claims to arbitration. *Sullivan v. Nicoulin*, 113-76.

### SEC. 3348. Other demands—order of payment.

[For earlier annotations, see code, page 1204.—Ed.]

Until the time for filing claims has expired the court cannot know judicially that there are no claims against the estate. *Seery v. Murray*, 107-384.

Where no other provision is made by will, the debts and charges against the estate of decedent are payable from the personal property of the estate, if it be sufficient for that purpose. *Pitkin v. Peet*, 108-480.

### SEC. 3349. Limitation.

[For earlier annotations, see code, pages 1204-7.—Ed.]

Where the deceased was surety on a bond in which principal and sureties obligated themselves, and their "heirs, executors and administrators," liability on which bond did not accrue until after the period fixed for filing claims against the estate, held, that such liability could be enforced against the estate in the hands of the distributees, although no claim under the bond had been filed within the time for settling the estate. *Security F. Ins. Co. v. Hansen*, 104-264.

withstanding the statutory bar had accrued, it appearing that the estate was solvent and still unsettled. *Henry v. Day*, 114-454.

The burden is upon defendant to establish the bar of the claim by limitation under this section, and for that purpose the proper giving of notice must be established. *McConaughy v. Wilsey*, 88 N. W., 1101.

Where a person having a claim against an estate, consisting of a note in the hands of a bank, directed an officer of the bank to take proper steps to have the claim presented, and was afterwards assured by such officer within the time for filing claims that the note had been properly filed, which was not true, and was thereby misled, held that he was entitled to equitable relief, although the estate had been otherwise fully settled and the personal property distributed, it appearing that there was real estate belonging to decedent against which the claim might be enforced. *Manatt v. Reynolds*, 114-688.

The limitation as to the time for filing a claim is not controlling where the claim is contingent. *Easton v. Somerville*, 111-164.

Where the date of giving notice does not appear the limitation cannot be applied. *Ibid.*

Where the holder of a note against deceased was induced to withhold the filing of his claim by the false and fraudulent representations of the executor that the estate was insolvent, held that equity would permit the filing of the claim not-

## CHAPTER 4.

## OF THE DESCENT AND DISTRIBUTION OF THE INTESTATE'S PROPERTY.

## SECTION 3362. Personal property.

[For earlier annotations, see code, pages 1209-10.—Ed.]

Under our law the right to a distributive share of personalty in the estate of an intestate vests instantaneously in the heir upon the death of the owner and not from the time of distribution made. Distribution gives to the distributee no new title, but only ascertains the property to which title attaches. *Christie v. Chicago, R. I. & P. R. Co.*, 104-707.

After the time for administration has expired so that there are no claims of creditors on the property, the heirs of the deceased may maintain an action in their own names for the recovery of the assets of the estate. *Ibid.*

After the expiration of time for granting administration so that claims of creditors are no longer involved, the personal property of a deceased person vests in his heirs and any settlement they have made

or may make in regard to the estate will be binding upon them. *Ibid.*

The legal representative has the right of possession of all personal property owned by the deceased, and this cannot be limited by contracts of, or liens created by the heirs, nor can he be required by the heirs to satisfy the debts of the decedent out of one portion of the personal estate rather than another. *Foss v. Cobbler*, 105-728.

Heirs are not entitled to possession of personal property until through distribution or the expiration of the period of limitation for administration their interest therein has been definitely ascertained. *Ritchie v. Barnes*, 114-67.

Since the adoption of the Code of '73 the husband cannot by will dispose of the distributive share of the widow in personal property. *Poole v. Burnham*, 105-620.

## SEC. 3364. In kind—proceeds distributed.

Money recovered for the wrongful death of a person leaving a father or mother, and no wife or children may, when paid to the clerk in satisfaction of such judgment,

be applied to the satisfaction of judgments against the father and mother. *Cassady v. Grimmelman*, 108-695.

## SEC. 3366. Share of surviving spouse—dower.

[For earlier annotations, see code, pages 1210-14.—Ed.]

The fact that the wife who has been abandoned by her husband knows that he has married another woman, who believes her marriage to be lawful and cares for the children of the first marriage, will not estop the first wife from claiming dower in the estate of her husband after his decease. Failure of the first wife to reveal her relationship will not defeat her rights. *Dunn v. Portsmouth Sav. Bank*, 103-538.

The dower interest attaches when the title passes from the government, although no patent has issued. *Purcell v. Lang*, 108-198.

By an antenuptial contract fairly entered into, the consideration being that of marriage, the wife may be deprived of her interest in her husband's property, but if the contract operates to deprive the wife

of such interest without provision for her in the event she survives her husband, the burden is upon the husband or those representing him to show that the contract was fairly procured. *Fisher v. Koontz*, 110-498.

While a widow may in equity sell and convey her dower interest before assignment, yet she has no power to execute a mining lease for the premises, or any portion thereof. *Hook v. Garfield Coal Co.*, 112-210.

The exception in the statute as to dower in property sold at execution sale has no application as against a widow who claims under a title adverse to that of the party against whom the execution sale was made. *Sherod v. Ewell*, 104-253.

## SEC. 3367. Homestead.

[For earlier annotations, see code, pages 1214-15.—Ed.]

As between the dower right and the right to occupy the homestead for life it will be presumed that the widow is claiming her dower right unless her election to take the

homestead right appears, and to show such election to retain the homestead by continuance of occupancy it must appear that the premises occupied were in fact the

homestead of the deceased husband. *Peebles v. Bunting*, 103-489.

Mere delay in setting apart the widow's distributive share will not show an election to retain the homestead in lieu of the distributive share where the circumstances show that the right to the distributive share was being constantly asserted and recognized. *Wold v. Berkholtz*, 105-370.

The widow may set up the homestead character of premises in which she is en-

titled to a distributive share without thereby electing to accept occupancy of the homestead in lieu of dower. *In re Estate of Lund*, 107-264.

It not appearing that the distributive share set apart to the widow is so selected as to include the homestead, such distributive share is not exempt from her debts contracted prior to the setting apart thereof. *Benjamin v. Doerscher*, 105-391.

### SEC. 3369. Setting off survivor's share.

[For earlier annotations, see code, pages 1315-16.—Ed.]

On the death of the widow after she has become entitled to a distributive share, her heirs may have such share set apart. *In re Proctor's Estate*, 103-232.

The wife's distributive share in real property should be charged with its proportionate share of a mortgage on the entire real estate. *Trego v. Studley*, 106-742.

Unassigned dower interest is not subject to levy under execution. *Brightman v. Morgan*, 111-481.

Where two or more distinct tracts of land are by the will given to different parties, and the widow has her dower assigned in a lump out of one of them, the person to whom such tract passes by the will has the right of contribution against the person or persons to whom the other tract or tracts pass by the will. *Morey v. Morey*, 113-152.

### SEC. 3376. Share not affected by will—election.

[For earlier annotations, see code, pages 1317-20 —Ed.]

Devise in lieu of dower. Under the provisions of Code of '73 the grant of a life estate to the widow without provision that such grant should be in lieu of dower was not inconsistent with her taking a dower interest in the estate and in such case no election was required. *Sutherland v. Sutherland*, 102-535; *In re Proctor's Estate*, 103-232.

Under the statutory provisions in force before the adoption of this section, held, that a provision in the will charging the estate with support of the widow during her life, was not inconsistent with her dower interest, and no election between the provisions of the will and dower was required. *Bentley v. Bentley*, 112-625. See notes to Code § 3270 in this Supplement.

Election. Where the acts of the widow with reference to the property were properly referable to her position as administratrix, rather than to any claim of hers under the will, held, that they did not show an election to take under the will. *In re Proctor's Estate*, 103-232.

Where the widow fails to claim her dower right and thereby induces a claimant of the property to treat it as having full title, she is estopped from afterwards asserting her right therein. *Goldizen v. Goldizen*, 107-280.

Under the provisions of § 2452 of Code of '73, held that an election to accept under the provisions of the will might become effective without being entered of record. *Brightman v. Morgan*, 111-481.

Where no copy of the will has been served on the widow she is not called upon to elect between the provisions of the will and her statutory right of dower, and acceptance of a benefit under the will does not defeat her dower right. *Newberry v. Newberry*, 114-704.

If at the end of six months no election has been made it is to be conclusively presumed that the survivor elects to take under the will. But there can be no election by failure to act where no notice has been served and no consent is entered of record. *Bailey v. Hughes*, 88 N. W., 804.

### SEC. 3377. Election as between distributive share and occupancy of homestead.

Under the provisions of the Code of '73, held that continuous occupancy of the homestead by the widow, where she had a lease of the premises for life from the heirs, did not constitute an election to accept the homestead for life in lieu of

dower. The widow's primary right is to a distributive share, and unless she does something which deprives her of that right it will be sustained. *Robson v. Lamberton*, 88 N. W., 943. See, also, notes to Code § 2985 in this Supplement.

**SEC. 3378. Descent—to children.**

[For earlier annotations, see code, pages 1220-1.—Ed.]

The provisions of 27 G. A., ch. 37, are not effectual to legalize an inheritance tax under 26 G. A., ch. 28, as to real property descending to heirs before the curative act took effect. *Herriott v. Potter*, 89 N. W., 91.

**SEC. 3381. Heirs of parents.**

[For earlier annotations, see code, page 1222.—Ed.]

Descent cannot be claimed through a deceased non-resident alien relative any more than it can through a living relative who cannot inherit on account of being a non-resident alien. *Meier v. Lee*, 106-303. Where property is claimed by descent under the provisions of this section through an intervening relative, such descent is mediate and not immediate. *Ibid.*

**SEC. 3381-a. Parents by adoption—wife.** One half of the estate of any adopted child who shall die intestate and leaving no issue, shall descend to the parents by adoption of such child, and the other half to his or her surviving spouse. If one of the parents by adoption be dead, in case there was more than one such parent, the portion which would have gone to such parent shall go to the surviving parent by adoption. If such child leave no surviving spouse, his entire estate shall go to his parents by adoption; or if he leave but one such parent then to such parent. [29 G. A., ch. 136, § 1.]

**SEC. 3381-b. Heirs of parents by adoption.** If the adopted parent or parents, if more than one, be dead, the portion which would have gone to such parent or parents had they or either of them survived the intestate, shall be disposed of in the same manner as if such parent or parents had outlived the intestate and died in possession of such share, and so on through their ascending ancestors. [29 G. A., ch. 136, § 2.]

**SEC. 3381-c. Natural parents.** If heirs are not thus found, the portion thus uninherited shall go to the natural parents of the intestate, and in case of their death then to their heirs under the ordinary rules of descent. [29 G. A., ch. 136, § 3.]

**SEC. 3383. Advancements.**

[For earlier annotations, see code, pages 1222-3.—Ed.]

If a legacy is given by a parent or one standing *in loco parentis* and the testator afterwards makes an advancement or gift of money or property of the same kind to the same beneficiary, the presumption will arise that the gift was intended in satisfaction or substitution for the prior legacy, and unless this presumption is rebutted an ademption in full or *pro tanto*, as the gift is equal to or less than the prior benefit, will occur. *Davis v. Close*, 104-261.

An advancement to an heir previously given and received constitutes no consideration for a promissory note subsequently given in payment of the property received under such advancement. *Marsh v. Chown*, 104-556.

The doctrine of advancements applies only to intestate estates. *McCormick v. Hanks*, 105-639.

Where the father purchases land, the title to which is taken in the son's name, the presumption is in favor of an advancement

rather than a resulting trust, until the contrary intention is shown. *Culp v. Price*, 107-133.

An execution purchaser of an heir's interest in realty does not acquire priority over the right existing against the heir to deduct advancements from such interest. *Pinckney v. Collie*, 114-441.

An acknowledgment of indebtedness, with agreement and promise to pay at the death of the payee, and then to be deducted from the share of the estate of the payee coming to the debtor, is not an advancement, but an acknowledgment of indebtedness, and a devise to such payee does not constitute an extinguishment thereof. *Kinney v. Newbold*, 88 N. W., 328.

Book entries of advancement when shown to have been made by an ancestor, are evidence both of the fact of the advancements and of the intention with which they are given. *Whistler v. Whistler*, 89 N. W., 1110.

**SEC. 3384. Illegitimate children—inheritor from mother.**

[For earlier annotations, see code, page 1223.—Ed.]

An illegitimate child inherits from the mother, and the fact of the mother's death before descent cast will not prevent the

child from inheriting her share of the estate which would otherwise have descended to her. *Johnson v. Bodine*, 108-594.

**SEC. 3385. From father.**

[For earlier annotations, see code, pages 1223-4.—Ed.]

The recognition required by this section is sufficient if it is extensive, though not universal. The words "general and notorious" should be construed with reference to the circumstances and surroundings of the parties. And held that the evidence in a particular case was sufficient to show such recognition as to entitle an illegitimate son to inherit. *Van Horn v. Van Horn*, 107-247.

Recognition in another state will entitle an illegitimate son to inherit from his father, although the laws of such state do not provide for such inheritance. *Ibid.*

A statute as to inheritance by illegitimates must, like other statutes in derogation of the common law, be liberally construed with a view to promote its objects and assist the party in obtaining justice. *Ibid.*

The burden of proof to establish the parentage and recognition required rests upon the child claiming the right to inherit. *Watson v. Richardson*, 110-673.

Evidence in a particular case held not sufficient to establish such recognition in writing as to entitle the claimant to inherit. *Ibid.*

Declarations of the putative father are competent to show general or notorious recognition, but such evidence must be carefully scrutinized. In a particular case held that the evidence of such recognition was not sufficient. Evidence of cur-

rent rumors or reports, where the putative father lived at the time of the birth of the illegitimate child, to the effect that such child belonged to him, is admissible to show paternity. *Ibid.*

The recognition contemplated by the statute is not recognition as prospective heir, but recognition as an illegitimate child. If the conditions required by the statute exist at the time of the death of the ancestor, the child is entitled to inherit under this section. It is immaterial that the recognition antedated the enactment of the statutory provision authorizing inheritance by illegitimates thus recognized. *Alston v. Alston*, 114-29.

Evidence in a particular case held sufficient to show such recognition as to entitle an illegitimate son to inherit. *Ibid.*

The right of an illegitimate child, duly recognized, may be interposed in a partition proceeding to which the legitimate heirs of the deceased are parties. *Ibid.*

Declarations in letters to an illegitimate child held to amount to such recognition as to entitle the child to inherit from the person who by the letters admitted himself to be her father. *Britt v. Hall*, 90 N. W., 340.

Evidence of recognition in particular cases held not sufficient. *Brown v. Iowa Legion of Honor*, 107-439; *Markey v. Markey*, 108-373; *McCorkendale v. McCorkendale*, 111-314; *Duffy v. Duffy*, 114-581.

**SEC. 3386. Heir or beneficiary causing death or disability.** No person who feloniously takes or causes or procures another so to take the life of another shall inherit from such person, or receive any interest in the estate of the decedent as surviving spouse, or take by devise or legacy from him, any portion of his estate; and no beneficiary of any policy of insurance or certificate of membership issued by any benevolent association or organization, payable upon the death or disability of any person, who in like manner takes or causes or procures to be taken the life upon which such policy or certificate is issued, or who causes or procures a disability of such person, shall take the proceeds of such policy or certificate; but in every instance mentioned in this section, all benefits that would accrue to any such person upon the death or disability of the person whose life is thus taken or who is thus disabled shall become subject to distribution among the other heirs of such deceased person, according to the foregoing rules of descent and distribution in case of death, and in case of disability the benefits thereunder shall be paid to the disabled person. [29 G. A., ch. 135, § 1.]

## CHAPTER 5.

## OF ACCOUNTING AND MISCELLANEOUS PROVISIONS.

**SECTION 3394. Report.**

[For earlier annotations, see code page 1225.—Ed.]

Where the executor has made use of the funds of the estate in his own business he should account for interest thereon at the rate of six per cent. per annum, with annual rests. *In re Brown's Estate* 113-351.

**SEC. 3398. Mistakes corrected.**

[For earlier annotations, see code, page 1226.—Ed.]

Mistakes in settlement may be corrected at any time before final settlement, and the provisions of the next section limiting the time within which application may be made to open up accounts settled in the absence of parties in interest, held to have no application to mistake or fraud in the settlement of the administrator's intermediate accounts. *Dorris v. Miller*, 105-564.

**SEC. 3399. Settlement contested.**

[For earlier annotations, see code, pages 1226-7.—Ed.]

Where the executor uses money of the estate in acquiring property in his own name, a settlement based on a report in which he claims credit for such property as belonging to the estate should be set aside. *In re Brown's Estate*, 113-351.

The office of exceptions to executor's report is not to demand affirmative relief, but to call the attention of the court to errors of admission or commission in the statements of the account. The report and the objections form the issues to be tried and involve no more than the correctness of the account presented by the executor as such. The individual liability of the executor is not involved. *Ibid.*

**SEC. 3400. Discharge.**

[For earlier annotations, see code, page 1227.—Ed.]

The report of the executor should not be approved where it appears that he still has funds to distribute. *Lippert v. Lippert*, 110-550.

**SEC. 3405. Failure to account.**

This section imposes a penalty which accrues to the estate immediately upon the default of the executor, and if the probate court has not exonerated the executor for the default he cannot be heard in an action against him on his bond to set up an excuse. *Lippert v. Lippert*, 110-550.

**SEC. 3415. Compensation.**

[For earlier annotations, see code, pages 1230-1.—Ed.]

The compensation provided for by statute does not cover services in making investments, passing on the value of securities, and transacting like business for deceased, but additional compensation cannot be awarded where there is no evidence offered as to the value of such additional services. *Fitzgerald v. Paisley*, 110-98.

perpetuate himself as administrator of the estate, the effort to secure such appointment being unsuccessful. *Dorris v. Miller*, 105-564.

An attorney is not entitled to compensation out of the estate for services rendered to an administrator in an attempt to

Generally speaking, an executor or administrator is not *prima facie* chargeable with interest during the time the law allows for collecting the estate and settling the accounts, which is usually one year after administration is taken. *Ibid.*

# PART THIRD.

## CODE OF CIVIL PRACTICE.

### TITLE XVIII.

#### OF PROCEDURE IN COURTS OF ORIGINAL JURISDICTION.

##### CHAPTER 1.

###### OF PRELIMINARY PROVISIONS.

###### SECTION 3424. Proceedings.

Every proceeding in court is an action, and the word "action," as employed in this section has a technical meaning. *Morris v. Lowry*, 113-544.

An action is a proceeding in court. The cause of action is the fact or facts that justify it or show the right to maintain

it. It is every fact necessary to be proven if traversed in order to support the right to a judgment. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. *Box v. Chicago, R. I. & P. R. Co.*, 107-660.

###### SEC. 3425. Civil and special actions.

[For earlier annotations, see code, page 1233.—Ed.]

Unless particularly provided for, a jury is not usually allowed in a special proceeding. *In re Bradley*, 108-476.

An action of forcible entry and detainer is a special proceeding. *Herkimer v. Keeler*, 169-680.

The proceeding under Code § 3826 to compel an attorney to account is a special proceeding. *Union Bldg. & Sav. Assn. v. Soderquist*, 37 N. W., 433.

###### SEC. 3427. Equitable proceedings.

[For earlier annotations, see code, pages 1234-5.—Ed.]

One who desires to recover money paid for land on the ground of fraud or mistake may tender a reconveyance and bring action at law. He has no occasion for relief in equity. *Watson v. Bartholomew*, 106-576.

Not every action for an accounting is cognizable in equity. *Citizens' Bank v. Whinery*, 110-390.

Where there was an agreement that the case should be tried in equity, but the rec-

ord disclosed subsequent entries showing waiver of a jury, without reference to such agreement, held that it did not sufficiently appear that the case was transferred to the equity docket. *Ibid.*

An instrument absolute in form may be shown to be a mortgage in an action at law as well as in equity, and fraud of this character relied on does not necessitate the transfer of a law action to the equity docket. *Frick v. Kabaker*, 90 N. W., 498.

###### SEC 3428. Action on note and mortgage.

[For earlier annotations, see code, pages 1235.—Ed.]

A general judgment on a note does not merge the mortgage secured thereby. *Smith v. Moore*, 112-60.

**SEC. 3431. Ordinary proceedings.**

[For earlier annotations, see code, page 1235.—Ed.]

This section distinguishes the method of a jury trial in special proceedings. *In re Bradley*, 108-476.

This section distinguishes the method of trial in ordinary and in equitable proceedings, but does not necessarily imply

**SEC. 3432. Error—effect of**

[For earlier annotations, see code, page 1236.—Ed.]

If the case when commenced is well founded and presents an issue properly triable in equity, the court will have jurisdiction, although the equitable ground of relief is removed, and the court will retain the case for final judgment. *Heath v. Halfhill*, 106-131.

in equity is cognizable only at law cannot be raised by demurrer. *McCormick Har. Mach. Co. v. Markert*, 107-340; *McClure v. Dee*, 88 N. W., 1093.

The objection that an action commenced

The objection that a proceeding should have been in probate instead of in equity is not jurisdictional. *Easton v. Somerville*, 111-164.

**SEC. 3434. How corrected by defendant.**

[For earlier annotations, see code, page 1236.—Ed.]

The fact that defendant in an action at law asks an injunction by way of cross-action does not require the transfer to the equity docket of a proceeding by motion to dissolve such injunction. *Brody v. Chittenden*, 106-340.

The action of the court in improperly overruling a motion to change the forum will be a ground for reversal. But where the issues in an action commenced in equity are such as must be tried by the court without a jury in an action at law, a refusal to sustain a motion to transfer, even though erroneous, will be error without prejudice. *McCormick Har. Mach. Co. v. Markert*, 107-340.

The plaintiff cannot, after issue joined, be taken against his will out of a forum in which his action was properly brought, when he has done nothing to disqualify himself from proceeding therein. Therefore held that where the action was properly brought in equity to foreclose an attorney's lien, the defendant could not, after filing his answer, by releasing the lien under the provisions of Code § 322, insist on the transfer of the case to the law docket. *Crissman v. McDuff*, 114-83.

Where the action is properly brought in equity, a defendant has no right to trial by jury of a law issue presented by his answer. *Ibid.*

**SEC. 3435. Equitable issues.**

[For earlier annotations, see code, pages 1237-8.—Ed.]

In a law action issues cognizable in equity may be transferred to the equity docket, but the issues at law in such case should not be so transferred. *Johnston v. Roebuck*, 104-523.

Where the trial of the issues at law will practically settle all matters in controversy such issues should be first tried. *Ibid.*

That the pleadings in an action at law set out facts which, if true, would entitle plaintiff to equitable relief is immaterial so long as such relief is not demanded. *Boyce v. Allen*, 105-249.

An issue is not equitable within the meaning of the statutory provision as to changing the forum so long as the relief

asked or the defenses interposed are not equitable. *Ibid.*

Where an equitable defense is pleaded to a law action, while that issue may be tried by the court, the right of plaintiff to a jury trial on the case he presents is not affected. *Tufts v. Norris*, 88 N. W., 367.

[Substitute for the paragraph in the Code notes to this section which purports to state the case of *Carey v. Gunnison*, 65-702, the following:]

If the defense of mistake, which might be interposed in an action at law, involves facts which might also be made the ground for equitable relief, then such facts may be set up in an equitable answer, and the issue arising on such answer will be triable to the court. *Carey v. Gunnison*, 65-702.

**SEC. 3437. Errors waived.**

[For earlier annotations, see code, pages 1238-9 —Ed.]

Where the objection to an equitable action is as to the forum in which it is brought and not to plaintiff's right to maintain it, the failure to move to transfer to

the proper docket will be a waiver, but not where the plaintiff could not maintain his action in equity because he has a plain, adequate and speedy remedy at law. Such

objection may be urged even for the first time in the supreme court. *McLachlan v. Gray*, 105-259.

Defendant in an action in which equitable relief is asked may object to the maintenance of the action on the ground that no such relief can properly be given. He is not required to move for a transfer of the case to the law docket on the theory that it is improperly brought in equity, even though damages in an action at law might be recovered for the wrong done. *Cooper v. Cedar Rapids*, 112-367.

### SEC. 3438. Uniformity of procedure.

[For earlier annotations, see code, page 1239.—Ed.]

This section does not necessarily require a jury trial in special proceedings. *In re Bradley*, 108-476.

Proceedings in an action of forcible entry and detainer are to be governed by the

Where the relief sought in an action might be awarded either at law or in equity, by failing to ask for a transfer of the action to the equity docket, any error in the proceedings of the case on the law docket is waived. No suit is to be dismissed or abated because of an error in the kind of proceedings. *Matthews v. Luers Drug Co.*, 110-231.

Where a case is tried without objection in equity, it is properly triable *de novo* on appeal. *Clearfield Bank v. Olin*, 112-476.

rules applicable to ordinary actions. *Herkimer v. Keeler*, 109-680.

A proceeding to suspend or disbar an attorney is a special action to be prosecuted by ordinary proceedings. *Hyatt v. Hamilton County*, 90 N. W., 508.

**SEC. 3439. Actions on judgments.** No action shall be brought upon any judgment against a defendant therein, rendered in any court of record of the state, within fifteen years after the rendition thereof, without leave of the court, for good cause shown, and on notice to the adverse party; nor on a judgment of a justice of the peace in the state within eight years after the same is rendered, unless the docket of the justice or record of such judgment is lost or destroyed; but the time during which an action on a judgment is prohibited by this section shall not be excluded in computing the statutory period of limitation for an action thereon. The provisions of this section shall apply to all judgments rendered after the taking effect of the code of 1873, and prior to the taking effect of the code of 1897, but the time within which an action may be brought on any judgment rendered during said period, which would otherwise be barred by this amendment, is hereby extended one year after the taking effect hereof. [C. '73, § 2521.] [29 G. A., ch. 137, § 1.]

[For earlier annotations, see code, page 1239.—Ed.]

Such provision in the Code of '73 did not operate to extend the statutory period of limitation on judgments rendered before that code took effect. *Wilson v. Tucker*, 105-55.

The change in the statute made by the addition of the last clause to this section in the present Code is not applicable to judgments rendered more than twenty years before the taking effect of the Code. *Cassady v. Grimmelman*, 108-695.

The change in this section as adopted in the present Code is not applicable to judgments already rendered. *Norris v. Tripp*, 111-115.

The case of *Weiser v. McDowell*, 93-772, is followed with reference to the judgment of a justice of the peace rendered before the taking effect of the Code. *Parks v. Norton*, 114-732.

**SEC. 3439-a. Repeal.** All acts and parts of acts inconsistent with this act are hereby repealed. [29 G. A., ch. 137, § 2.]

### SEC. 3440. Judgments not annulled in equity.

[For earlier annotations, see code, page 1240 —Ed.]

A court of equity cannot modify a judgment rendered in an action by ordinary

proceedings. *Hornish v. Ringen Stove Co.*, 89 N. W., 95.

### SEC. 3443. Actions survive.

[For earlier annotations, see code, pages 1240-1.—Ed.]

This section does not create a new cause of action for an injury causing death, but

only provides that the cause of action of the party who dies shall pass to the admin

istrator as assets of the estate. *Sachs v. Sioux City*, 109-224.

The right of action for an injury causing death accrues to the estate, and the wife cannot maintain in her own name an action for injuries resulting to her from causing the death of her husband. *Major*

*v. Burlington, C. R. & N. R. Co.*, 88 N. W., 815.

To entitle to recover in an action for injuries causing death it must be shown that the death was caused by the wrongful act of the defendant. *Pearson v. Wilcox*, 109-123.

### SEC. 3445. Actions by or against legal representatives—substitution.

[For earlier annotations, see code, page 1241-3.—Ed.]

Where on the death of plaintiff his administrator was ordered to be substituted, but the case proceeded to judgment in the name of the original plaintiff without such substitution being made, held, that afterwards by a *nunc pro tunc* entry the court

could cure the defect and validate proceedings under such judgment. *Hunt v. Johnston*, 105-311.

Section applied. *Edmunds v. Illinois Cent. R. Co.*, 80 Fed., 78; *Y-Ta-Tah-Wah v. Rebock*, 105 Fed., 257.

### SEC. 3446. Construction of code provisions.

[For earlier annotations, see code, pages 1242-3.—Ed.]

A statute in derogation of the common law must be liberally construed with a view to promote its objects and assist the par-

ties in obtaining justice. *Van Horn v. Van Horn*, 107-247.

## CHAPTER 2.

### OF LIMITATION OF ACTIONS.

#### SECTION 3447. Period of.

[For earlier annotations, see code, pages 1244-64.—Ed.]

In general. Equity will apply its rules as to the effect of delay and laches in analogy to the statute of limitations. *Adams v. Holden*, 111-54.

While it is true that the statute of limitations relates only to the remedy, and may change from time to time, without impairing the obligation of contracts, yet the legislature has no power to cut off the remedy, or bar a suit upon an existing cause of action instantan. A reasonable time must be given within which to prosecute an existing cause of action under the new statute. Therefore, held that the last clause of Code § 3439 was not applicable to judgments rendered more than twenty years before the Code took effect, and as to which, under the section as it previously stood, and as construed in *Weiser v. McDowell*, 93-772, there was still a right to bring suit. *Cassady v. Grimmelman*, 108-695.

It is not competent for the legislature by a statute of limitations to take away all remedies existing upon causes of action. *Norris v. Tripp*, 111-115.

The period of limitation may be changed by the legislature at pleasure with reference to causes of action already existing, provided that, if they are shortened, the bar is not immediate, and a reasonable time remains in which to sue, but contract limitations, such as those which are

usually inserted in policies of fire insurance cannot be impaired by subsequent legislation. *Farmers' Co-op. Creamery Co. v. State Ins. Co.*, 112-608.

While the new limit may constitutionally be made applicable to causes of action already existing, provided a reasonable time is allowed after the statute takes effect in which the action may be brought, yet the general rule of construction is that such a statute will be given a retrospective effect only where it appears that such was the intention of the legislature. *Waples v. Dubuque*, 89 N. W., 194.

Effect. The defense of the statute of limitations is not a dishonorable one and it is not libelous to charge a debtor with having escaped the payment of his just debts by interposing such a defense. *Hollenbeck v. Hall*, 103-214.

Must be pleaded. The plea of the statute of limitations can be raised only by answer, where the allegations of the petition show that the claim is not barred. *Goring v. Fitzgerald*, 105-507.

Where the bar of the statute is not raised by demurrer, nor otherwise, it will be regarded as waived. *In re Estate of McMurray*, 107-648.

The court should not submit the statute of limitations to the jury as a defense unless it is pleaded, and a judgment for defendant founded on a verdict returned

on that ground will be set aside, even though facts on which such plea might have been founded appear in the record. The statute is deemed waived if not pleaded. *McDonald v. Bice*, 113-44.

**In case of disability.** After the statute of limitations once commences to run it is not tolled by the subsequent disability of him in whose favor the cause of action exists. *Black v. Ross*, 110-112.

Therefore held that insanity of a debtor, after a cause of action against him had accrued, would not extend the statute of limitations. The provisions of Code § 3453 with reference to limitation of actions against an insane person apply only to causes of action accruing during disability. *Ibid.*

**In case of death.** The running of the statute of limitations is not interrupted by the death of the creditor. In general the statute may not be suspended after it has commenced to run. At any rate, mere denial of liability will not have the effect of suspending the running of the statute. *Merecess v. First Nat. Bank*, 112-11.

**Estoppel.** Where a person holding a cause of action is assured by the person against whom the claim exists that the statutory limitation will not be interposed, pending negotiations for settlement, with the intention that the former shall rely on such assurance, and he does so, the person against whom the claim exists cannot in a subsequent suit on such claim interpose the bar of the statute which has accrued during the time when the person holding the claim was reasonably relying on the assurance of the other party that no such claim would be made. *Holman v. Omaha & C. B. R. Co.*, 90 N. W., 833.

**Amendment.** Where the original petition states a complete cause of action, and the amendment states another, the two causes of action being so distinct that either could be established without reference to the facts alleged in the other, the two causes of action are distinct, and the one stated in the amendment will be barred if the time for suing thereon has elapsed when the amendment is filed, although the action was commenced before the bar had become complete. *Box v. Chicago, R. I. & P. R. Co.*, 107-660; *Taylor v. Taylor*, 110-207.

But an amendment to conform the pleadings to the facts may properly be made to save the cause of action which it was attempted to plead in the first instance. *Taylor v. Taylor*, 110-207.

**When action accrues.** Where the petition does not state the exact time of the breach, but is based upon a promise which is continuing, a demurrer that the cause of action is barred will not lie. *Rime v. Rater*, 108-61.

Under a contract for winding up the business of a partnership in which it is

agreed that each member is to be liable to the other for such assets of the firm as he may reduce to possession, the statute of limitations does not commence to run from the time of the making of the contract, but rather from the time liability thereunder accrues. *Varnum v. Winslow*, 106-287.

The right of action for substantial damages under a covenant against encumbrancers does not accrue until the encumbrance has been broken by the enforcement of the lien which constitutes the encumbrance. *McClure v. Dee*, 88 N. W., 1093.

The statute of limitations does not commence to run against a cause of action for substantial damages for breach of covenant of warranty until such damages are actually sustained. *Foshay v. Shafer*, 89 N. W., 1106.

**In cases of trust.** The statute of limitations does not begin to run in favor of a person holding property in trust until he has actually repudiated the trust. *Zunkel v. Colson*, 109-695.

Where a grantee in a conveyance which is in fact a mortgage receives full payment of the debt, he thereupon becomes a trustee, and cannot plead the statute of limitations for the purpose of securing or holding title, unless he has done some act indicating the disaffirmance of the trust. *Adams v. Holden*, 111-54.

**In cases of fraud.** The action by a creditor to subject property fraudulently conveyed by his debtor to the payment of his claim accrues when he has notice of the fraud, and he must bring his action within the statutory period from that time. *Stubblefield v. Gadd*, 112-681.

Proceedings to subject property to the satisfaction of a judgment must be brought within five years. *Applegate v. Applegate*, 107-312.

So long as the owner is non-resident the action will not become barred. *Ibid.*

**Postponing demand.** A ward has a right to an accounting upon reaching his majority, and cannot, by postponing the demand therefor, extend the period of limitation. *Ackerman v. Hilpert*, 108-247.

As against an action on a certificate of deposit, payable on demand, the statute of limitations commences to run at once, without demand being made. *Merecess v. First Nat. Bank*, 112-11.

**Concealment.** If the facts, which a recorded deed shows, with other facts known, are of a character to suggest fraud, persons interested must be charged with the knowledge which inquiry made with reasonable diligence would disclose. *Clark v. Van Loon*, 108-250.

The mere deception practiced by the debtor in denying liability will not constitute such concealment as to prevent the running of the statute of limitations. *Merecess v. First Nat. Bank*, 112-11.

The statute does not begin to run where the cause of action is fraudulently concealed until the facts are discovered or might have been discovered by the exercise of diligence. *Cole v. Charles City Nat. Bank*, 114-632.

In cases where concealment and ignorance of facts are relied on to suspend the running of the statute there must have been such concealment as would prevent a person exercising due diligence from discovering the facts. *Murray v. Chicago & N. W. R. Co.*, 92 Fed., 868.

**Par. 1. For injuries from defects in roads or streets—notice.** The objection that action against a city for personal injuries received on account of defective streets is not brought within six months after the happening of the injury and that no written notice of the claim has been given is one that must be urged in the lower court, otherwise it cannot be considered on appeal. *Reed v. Muscatine*, 104-183.

The provision for notice is applicable in a case where the injured party has survived more than three months after the injury, and action in behalf of his estate is subsequently brought for the same injury by his administrator. *Sachs v. Sioux City*, 109-224.

This provision is applicable where the injury originated in the neglect of the municipality to properly construct or maintain a bridge; for a bridge is properly a part of the street. *Ibid.*

The object of the statute as to notice is to apprise the city authorities of the location of the defect and the circumstance attending the accident with such reasonable certainty as shall enable them not only to investigate the city's liability while the facts are fresh, but also to ascertain what evidence there may be of conditions then existing, and of the character of the injury while witnesses are at hand. A notice by plaintiff's attorney to defendant demanding a settlement of his claim, not containing any statement of the place or circumstances of the injury, is not sufficient. *Giles v. Shenandoah*, 111-83.

Where an action was brought within ninety days on a claim against the city for defective sidewalk, and the original notice specified the time, place and circumstances of the injury, held that this was sufficient notice to entitle the plaintiff to recover in another action brought after the expiration of six months. *Pardey v. Mechanicsville*, 112-68.

Reasonable certainty as to the place is all that is required in the notice. *Rush v. Dubuque*, 90 N. W., 80.

Code § 1051, containing provisions similar to those of this paragraph, held applicable only to cities under special charter. *Harvey v. Clarinda*, 111-528.

The provisions of Code § 1050 as to the limitation of claims for unliquidated damages against special charter cities, held

not applicable to claims existing at the time the Code took effect. *Thoeni v. Dubuque*, 88 N. W., 367.

**Par. 3. For statutory penalty.** An action to recover three times the excessive charge of a common carrier, as authorized by 22 G. A., ch. 28, § 9, held, to be an action for a penalty which must be therefore brought within two years (following *Herriman v. Burlington, C. R. & N. R. Co.*, 57-187, and distinguishing *Koons v. Chicago, & N. W. R. Co.*, 23-493). *Baker Wire Co. v. Chicago & N. W. R. Co.*, 106-239.

**Par. 5. Against sheriff or other public officer.** While the action against a sheriff for wrongful levy upon property is barred in three years, yet an action on an indemnifying bond given by the execution plaintiff to protect the sheriff may be brought within ten years. *Whitney v. Gammon*, 103-363.

**Par. 6. Unwritten contracts—other actions.** The right of one joint obligor to recover against the other for his share of payments made on the joint obligation is barred in five years. *Noval v. Dupont*, 112-334.

**Par. 7. On written contracts.** A written agreement on the back of a certificate of assessment for street improvements, by which the property owner undertakes to pay the amount of the assessment in instalments, is a written contract upon which action may be brought within ten years from the maturity of the demands called for. *Talcott v. Noell*, 107-470.

A suit to foreclose a mortgage is barred in ten years, and as the rights of mortgagor and mortgagee are reciprocal, redemption under a mortgage will be cut off in the same time. *Adams v. Holden*, 111-54.

The guardian's principal undertaking to account for funds received by him is a contract, and an action for failure to account for funds so received is an action for breach of contract within the statute of limitations. *Blakeney v. Wyland*, 89 N. W., 16.

An action in the federal court on coupons from bonds issued by a municipality is governed by the state statute, and coupons maturing more than ten years prior to the commencement of the action are barred. *Reynolds v. Lyon County*, 97 Fed., 155.

On judgments. The rule adopted in *Weiser v. McDonnell*, 93-772, has no application to a judgment rendered before the Code of '73 went into effect. *Wilson v. Tucker*, 105-55.

**For recovery of real property—adverse possession.** While it will be presumed that possession of land extends to the entire tract covered by the occupant's claim of right, such presumption will not prevail as against actual adverse possession by another of a portion of the tract covered by such claim, of which possession the

claimant of the entire tract has knowledge. *Libby v. Young*, 103-258.

Acts of ownership sufficient to constitute adverse possession of uncultivated land are such acts as are necessary to the enjoyment of its use in its present condition and to acquire the profits which such lands would yield. *Rogers v. Turpin*, 105-183.

Where the owner of a government subdivision of land erected a fence and subsequently planted a hedge on what he claimed to be his line, and cultivated to such fence, and the adjoining proprietor likewise in cultivation recognized the fence as the boundary line, and this claim and recognition continued for ten years, held that the first party had acquired title by adverse possession to a strip of land included by his fence beyond the true boundary of the subdivision of land to which he had title. *Fullmer v. Beck*, 105-517.

Where possession of land is taken under the belief that it is part of a tract which is purchased, which belief is not in accordance with the facts, the possession will not constitute adverse possession. *Murphy v. Olberding*, 107-547.

Where a survey is had to ascertain the line, and the line thus ascertained is treated as the correct one, under the belief that it is so, possession of such land will not be adverse of any portion of the adjoining tract which by mistake has been included within the premises. *Kahl v. Schmidt*, 107-550.

If co-terminal owners have adopted another line than that of the government survey as their division line, and have occupied up to it and recognized it as such for a period of ten years, then such line is to be regarded as the boundary line. *Miller v. Mills County*, 112-654.

Acquiescence in a certain line, with possession up to it for a period of ten years, is conclusive evidence of an agreement as to the true line, and will bind the parties concerned. *Azmear v. Richards*, 112-657.

Where a division line between adjoining owners has been acquiesced in by them for a period of ten years, an agreement to make it the true boundary will be implied, and neither may ordinarily be heard to dispute it. *Kulas v. McHugh*, 114-188.

Occupation to a boundary line, acquiesced in by the parties as being founded on a claim of right is adverse, regardless of whether the boundary by acquiescence is the true boundary. *Klinker v. Schmidt*, 114-695.

The acts of ownership relied on to constitute adverse possession, when there is no actual occupancy, must be such as are necessary to the enjoyment of the use, and to acquire the profits the land may yield in its present condition. *Stern v. Fountain*, 112-96.

Where the defendant has not been in possession of the property in dispute, no cause of action can be deemed to have accrued against him unless he has in some other way asserted some right thereto. *Mead v. Illinois Cent. R. Co.*, 112-291.

Use of a right of way, with permission of, and without claim of right in hostility to, the owner is not adverse possession. *Friday v. Henah*, 113-425.

Adverse possession must be shown to sustain the plea of the general statute of limitations in an action to recover possession of real property. *Gild v. Candler*, 114-332.

Where plaintiff entered upon public land as a homestead claim, held that his possession after title was passed by the government under a railroad grant and his entry was canceled was adverse. *Wilbur v. Cedar Rapids & M. R. Co.*, 89 N. W., 101.

Possession by one tenant in common is presumptively for his co-tenants as well as himself and not adverse to them and the burden is on him to show that it was adverse for the required length of time to give him title as against them under the statute of limitations. He must show that the possession was with the intent to hold adversely and such intent must be indicated by acts calculated to exclude the co-tenants. *Bader v. Dyer*, 106-715.

Exclusive occupancy by one tenant in common accompanied by acts and declarations of ownership, if known to his co-tenant, will amount to an ouster. Notice may be shown by circumstantial evidence. *Casey v. Casey*, 107-192.

The possession of a tenant in common is not adverse to his co-tenants until he has in some unmistakable manner given to such co-tenants notice or sufficient reason to know that he claims the property adversely. *Zunkel v. Colson*, 109-695.

As to streets. The statute of limitations will not run to defeat the city in the exercise of its governmental authority with reference to streets. *Chicago, R. I. & P. R. Co. v. Council Bluffs*, 109-425.

While it may be that the statute of limitations as to real property does not run against a claim of a city to premises belonging to it as a street, yet it may so deal with the property, by recognizing the rights of another as owner thereof, as to estop itself from asserting the title thereto. The exaction of public charges against the property as belonging to a private owner will constitute such estoppel. *Davenport v. Boyd*, 109-248.

[In the Code notes to this section, on page 1245, second column, the reference for the case of *Auchampaugh v. Schmidt*, should be, 70-642, instead of 72-656. In the last paragraph on page 1248, second column, the word "stay" in the sixth line should be "start."]

**SEC. 3448. Fraud—mistake—trespass.**

[For earlier annotations, see code, pages 1264-5.—Ed.]

This provision as to when a right of action based on mistake accrues has no application to an action to recover taxes subsequently paid by a tax purchaser on property, as to which his tax title appears to have been defective by reason of mistake of the auditor. Such an action is barred in five years from the time of payment of taxes. *Lonsdale v. Carroll County*, 105-452.

The fraud referred to in this section is such as was originally cognizable in equity, but the matter of mistake is not

so limited. Therefore in case of a mistake, whether cognizable in equity or at law, the action does not accrue until discovery of the mistake. *Baird v. Omaha & C. B. R. & B. Co.*, 111-627.

Section applied in case of mistake. *Cole v. Charles City Nat. Bank*, 114-632.

The fraud referred to in this section is such as is solely cognizable in a court of equity. *Daugherty v. Daugherty*, 90 N. W., 65.

**SEC. 3450. Commencement of action.**

[For earlier annotations, see code, pages 1267-8.—Ed.]

This provision is applicable also to special statutory limitations. *Smith v. Callanan*, 103-218.

The delivery of an original notice to the sheriff for service does not constitute the commencement of the action where, after it has been placed in the sheriff's hands, he is unable to make service, and two terms of court are allowed to intervene without further attempt to have service made. The intention that the notice shall be served must be continuous, and the effect of it is

lost where the notice placed with the sheriff is abandoned. *Richardson v. Turner*, 110-318.

Where a substituted petition sets up a cause of action, of the same nature, but not founded on the same facts, the cause of action is not to be deemed the same, and if the substituted petition is not filed within the statutory period, the cause of action therein pleaded is to be deemed barred. *Brooks v. Seevers*, 112-480.

**SEC. 3451. Nonresidence.**

[For earlier annotations, see code, pages 1268-9.—Ed.]

In an action to subject property fraudulently conveyed to the payment of a judgment, nonresidence will prevent the run-

ning of the statute until the property comes into the hands of a resident. *Applegate v. Applegate*, 107-312.

**SEC. 3452. Bar in foreign jurisdiction.**

[For earlier annotations, see code, page 1269-70.—Ed.]

An action for wrongful attachment in another state where the cause of action arose and the defendant resides, which is barred by the laws of that state, is also barred here. *Smyth v. Peters Shoe Co.*, 111-388.

Where a note executed in another state is mailed to the payee in this state, in

accordance with agreement, express or implied, the cause of action on such note is one arising in that state, and if barred by the law of that state where the maker resided and still continued to reside until the bar was completed, it is barred here although the payee of the note has resided in this state. *Tharp v. Thero*, 112-573.

**SEC. 3453. Minors and insane persons.**

[For earlier annotations, see code, page 1270.—Ed.]

The provisions of this section apply only to causes of action accruing during the disability referred to. If the right of action has commenced before the commencement of the disability, the statute of limitations continues to run, and the action is barred at the expiration of the statutory period.

Therefore, held that the insanity of a debtor, occurring nine years and four months after the cause of action on a contract accrued, would not extend the limitation of action on the contract. *Black v. Ross*, 110-112.

**SEC. 3455. Failure of action.**

[For earlier annotations, see code, pages 1270-1.—Ed.]

Where plaintiff's first action was dismissed on account of his negligence in not filing the petition in time for the

term designated in his notice, held, that a subsequent action brought after the expiration of the statutory period of limi-

tation but within six months from the dismissal of the first action could not be sustained. *Conley v. Dugan*, 105-205.

A plaintiff against whom judgment has been rendered after refusal to amend upon ruling against him, on demurrer to his petition, cannot bring a new action under this section. *Gregory v. Woodworth*, 107-151.

Where the plaintiff is entitled to a continuance on account of an emergency arising in the progress of the case, but instead of asking such continuance he dismisses the action, he is negligent within the language of this section. *Pardey v. Mechanicsville*, 112-68.

This section does not apply where the

cause of action stated in the second action is different from that alleged in the first, though based on the same transaction. *Whalen v. Gordon*, 95 Fed., 305.

This provision has no application to a second action on a policy of insurance brought after the expiration of the limitation provided by the contract, although such action is commenced within six months of the dismissal of an action in which the plaintiff failed because it was prematurely brought. The contract provision in an insurance policy supersedes the statutory provisions. *Wilhelm v. Des Moines Ins. Co.*, 103-532. And see *Harrison v. Hartford F. Ins. Co.*, 67 Fed., 298.

### SEC. 3456. Admission in writing—new promise.

[For earlier annotations, see code, pages 1271-3.—Ed.]

The debtor cannot avoid a written admission of liability signed by him by showing that he signed the same without reading it under a misapprehension of its contents, due to statements of the attorney of the opposite party, which were not fraudulent. *Bannister v. McIntire*, 112-600.

In a particular case held that reference to the claim in a letter was sufficient to constitute a written admission or a new

promise. *McConaughy v. Wilsey*, 88 N. W., 1101.

Where a guardian in his written statement of account acknowledged the receipt of money as guardian, held that this was sufficient acknowledgment to extend the statute of limitations as to an action against him to recover the amount thus acknowledged to have been received. *Blakeney v. Wyland*, 89 N. W., 16.

## CHAPTER 3.

### OF PARTIES TO AN ACTION.

#### SECTION 3459. Plaintiff—party in interest—exception.

[For earlier annotations, see code, pages 1274-8.—Ed.]

Where a city provides salaries for police judge and marshal, so that the fees thereof are to go into the city treasury, the city may, as the real party in interest, bring action for the recovery of such fees in criminal cases from the county. *Des Moines v. Polk County*, 107-525.

One to whom a note is indorsed for collection may maintain an action thereon. *Lehman v. Press*, 106-389.

The assured in a contract of fire insurance may maintain an action to recover thereunder, although it has been pledged to a mortgagee. *Smith v. Continental F. Ins. Co.*, 108-382.

A party holding the title of an instrument may sue thereon. So, where the action was brought by a foreign receiver which could not be maintained by him as such receiver, held that as an individual to whom the cause of action sued on had been assigned he could maintain such action. *Hale v. Harris*, 112-372.

The executor named in a will cannot protest the probate of a codicil. *In re Estate of Stewart*, 107-117.

With respect to contracts made by the cashier of a bank for its benefit, he may maintain an action without joining the bank, being the trustee of an express trust for the bank. *Leach v. Hill*, 106-171.

The trustee of an express trust may bring action without joining those for whose benefit the action is prosecuted. *Zion Church v. Parker*, 114-1.

Defect of parties appearing on the face of the petition is waived by not objecting thereto in the proper manner. *Ibid.*

Where a contract is made for the benefit of a person not a party thereto, such third party may bring action thereon. Therefore, held that where one party authorized another to draw checks in his own name on a certain bank with the agreement that the first party would see that the checks were honored, the cashier of a bank receiving such checks had a right of action against the person who had agreed to see that the checks were paid. *Leach v. Hill*, 106-171.

The principle that one can sue upon the promise made to another for his benefit

is confined to cases where the person for whose benefit the promise is made has the sole, exclusive interest in its performance. *Chicago, R. I. & P. R. Co. v. Ottumwa*, 112-300.

One who sells property to another on an agreement that its value shall be credited on the note of a third person may, on failure of the purchaser to make the

credit as agreed, maintain an action against the purchaser for the value of the property. *Dorr Cattle Co. v. Jewett*, 89 N. W., 109.

This section will be recognized by the federal courts in determining whether a suit is brought in the name of the proper party. *Edmunds v. Illinois Cent. R. Co.*, 80 Fed., 78.

### SEC. 3460. Plaintiffs joined.

[For earlier annotations, see code, pages 1278-9.—Ed.]

Several judgment creditors may join as plaintiffs in an action to set aside a fraudulent conveyance. *Gamet v. Simmons*, 103-163.

Where the claims of the insured and the person for whose benefit the policy is

specified to have been taken have been assigned to another, who sues for the loss, there may be a reformation of the policy without the original parties thereto being made parties to the action. *Benesh v. Mill Owners' Mut. F. Ins. Co.*, 103-465.

### SEC. 3462. Defendants.

[For earlier annotations, see code, pages 1280-2.—Ed.]

In an action against an insolvent coporation, it is not necessary to make the receiver of the corporation a party defendant unless an attempt is made thereby to interfere with the right of the receiver to the property intrusted to his care. *State Bank v. McElroy*, 106-258.

It is not error to refuse to permit other parties to be brought in as defendants where there is no controversy presented by the pleadings the determination of which will affect their rights. *Burns v. Chicago, Ft. M. & D. M. R. Co.*, 110-385.

In an action on a non-negotiable instru-

ment, brought by a transferee thereof, the defendant, who has therefore the opportunity to make as against the holder any defense which he could make against the original payee, is not entitled to have the payee and assignor of the instrument made a party. *Stambaugh v. Current*, 111-121.

A misjoinder or uniting of parties who should not be joined cannot be taken advantage of by demurrer, but must be reached by motion. *Dolan v. Hubinger*, 109-408.

If such objection is not raised by motion it is deemed waived. *Lull v. Anamosa Nat. Bank*, 110-537.

### SEC. 3465. Joint and several obligations.

[For earlier annotations, see code, pages 1283-4.—Ed.]

If plaintiff maintains his action against one of several defendants he may have judgment against that one, and the other defendants may have judgment against plaintiff for costs. *Lull v. Anamosa Nat. Bank*, 110-537.

Notwithstanding the provisions of this

section, a partnership contract not to engage in a particular business for a specified time, although signed by the members of the firm as individuals, will be binding only on the partnership, and not on the individual members. *Streichen v. Fehleisen*, 112-612.

### SEC. 3466. Other parties brought in.

[For earlier annotations, see code, page 1284.—Ed.]

An action may be maintained against a surety alone without bringing in his principal. *Bannister v. McIntire*, 112-600.

In an action to recover real property it is not proper for defendant in a cross-petition setting up adverse possession by reason of occupation to a boundary line different from that recognized by plaintiff,

to bring in as co-defendants other parties owning adjoining property as to whom the same question may arise. *Klinker v. Schmidt*, 106-70.

A mortgagee of personal property, sued by the mortgagor for its conversion, has the right to have subsequent mortgagees brought in. *Kohn v. Dravis*, 94 Fed., 288.

### SEC. 3468. Partnership.

[For earlier annotations, see code, pages 1285-6.—Ed.]

The creditor of a partnership may bring an action against members of the partnership individually to charge them with a partnership debt without joining the firm,

but to maintain such action the plaintiff must show that the alleged indebtedness existed. In such a case it would be a complete defense to show that as between

plaintiff and the alleged members of the firm the indebtedness had been finally adju-

icated not to exist. *Baxter v. Rollins*, 110-310.

### SEC. 3475. Actions by state.

This provision has no relation to actions by a county or other municipal corporation, and an appeal in an action in which judgment is rendered against a

county will not suspend the judgment unless a supersedeas bond is filed. *Harrison v. Stebbins*, 104-462.

### SEC. 3476. Transfer—abatement.

[For earlier annotations, see code, pages 1287-8.—Ed.]

Where a cause of action is transferred by assignment there is no occasion for dismissing the action, nor is the assignee entitled to intervene. His proper relief, if any, is to have himself substituted as plaintiff. *Bank of Commerce v. Timbrell*, 113-713.

It is not necessary to substitute the assignee in further proceedings after the assignment of the cause of action pending litigation. *Emerson v. Miller*, 88 N. W., 803.

### SEC. 3480. Actions by minors.

[For earlier annotations, see code, pages 1288-9.—Ed.]

A court acquires jurisdiction in an action brought by a minor in his own name and not by guardian or next friend and though its judgment may be erroneous because the action is not properly brought it is not void. *Parkins v. Alexander*, 105-74.

Therefore, where in an action brought

by a minor in his own name before a justice of the peace judgment was rendered for the plaintiff and defendant appealed to the district court, held, that the latter court had jurisdiction to allow the substitution of a next friend as plaintiff and proceed with the case. *Ibid.*

### SEC. 3482. Defense by minor.

[For earlier annotations, see code, pages 1289-90.—Ed.]

A judgment against an infant without defense by a guardian is clearly erroneous, and such error may be made the

ground for granting a new trial under the provisions of Code § 4091. *Wise v. Schlosser*, 111-16.

### SEC. 3485. Defense of insane person—appointment of guardian.

[For earlier annotations, see code, page 1290.—Ed.]

Where plaintiff in an action against an insane defendant is unsuccessful, compensation for the services of the guardian ad

litem appointed by the court should be taxed against him as costs. *Burkhardt v. Burkhardt*, 107-369.

## CHAPTER 4.

### OF PLACE OF BRINGING ACTION.

#### SECTION 3491. In relation to real property.

[For earlier annotations, see code, pages 1291-2.—Ed.]

Where the court acquires jurisdiction by virtue of the location of the real property, one who is made defendant in the action and seeks to establish his title is not en-

titled to have the venue changed to the county of his residence. *Booth v. Bradford*, 114-562.

#### SEC. 3493. To foreclose mortgage or mechanic's lien.

[For earlier annotations, see code, page 1292.—Ed.]

Although this section requires that an action for the foreclosure of a mortgage

on real property shall be brought in the county in which the property to be affected

is situated, nevertheless the objection that an action to foreclose is brought in another county from that in which the property is situated is not jurisdictional, and if the defendant does not move for a transfer of the action to the proper county, he cannot

afterwards urge such objection. *McDonald v. Second Nat. Bank*, 106-517.

The statute confers on the defendant a right to insist upon a foreclosure suit being tried in the county in which the subject matter is situated, but this right may be waived by defendant. *Ibid.*

**SEC. 3494. Local actions.** Actions for the following causes must be brought in the county where the cause, or some part thereof, arose:

1. *For fines, penalties or forfeitures.* Those for the recovery of a fine, penalty or forfeiture imposed by a statute; but when the offense for which the claim is made was committed on a water course or road which is the boundary of two counties, the action may be brought in either of them;

2. *Against public officers.* Those against a public officer or person specially appointed to execute his duties, for an act done by him in virtue or under color of his office, or against one who by his command or in his aid shall do anything touching the duties of such officer, or for neglect of official duty;

3. *On official bonds.* Those on the official bond of a public officer;

4. *Executor, administrator or guardian.* Those on the bond of an executor, administrator, or guardian may be brought in the county in which the appointment was made and such bond filed. [C. '73, § 2579; R., § 2796.] [27 G. A., ch. 99, § 1.]

**SEC. 3496. Place of contract.**

[For earlier annotations, see code, page 1294.—Ed.]

A bond for the payment of damages which shall be sustained by failure to perform a decree which may be subsequently rendered is not a contract to be performed at any particular place. *Prader v. National Accident Assn.*, 107-431.

**SEC. 3497. Against common carriers.** An action may be brought against any railway corporation, the owner of stages, or other line of coaches or cars, express, canal, steamboat and other river crafts, telegraph and telephone companies, and the lessees, companies or persons operating the same, in any county through which such road or line passes or is operated. [C. '73, § 2582.] [29 G. A., ch. 138, § 1.]

[For annotations, see code, page 1294.—Ed.]

**SEC. 3499. Against insurance companies.**

[For earlier annotations, see code, page 1295.—Ed.]

These provisions as to place of bringing suit on a policy of insurance are applicable, although as an incident to the relief sought the court is asked to reform the terms of

the policy. *Benesh v. Mill Owners' Mut. F. Ins. Co.*, 103-465.

An insurance company may be sued where the contract of insurance is made. *Teller v. Equitable Mut. L. Assn.*, 108-17.

**SEC. 3499-a. Action against operators of coal mines brought in county where mine is located.** An action may be brought against any corporation, company, or person, owning, leasing, operating, or maintaining a coal mine, in the county where said mine is located, on any contract, or for any tort, in any manner connected with or growing out of the construction, use, or operation of said mine. [28 G. A., ch. 121, § 1.]

**SEC. 3500. Office or agency.**

[For earlier annotations, see code, pages 1295-6.—Ed.]

This section does not require that the office or agency be permanent rather than transient nor that the business carried on

be a considerable share of that done by the principal. *Locke v. Chicago Chronicle Co.*, 107-390.

**SEC. 3502. Residents of different counties.**

[For earlier annotations, see code, page 1297.—Ed.]

While a dismissal of the action as to resident defendants entitles non-resident defendants to dismissal as to them, such non-residents must ask relief by motion,

otherwise they will be bound by the adjudication. *Brown v. Iowa Legion of Honor*, 107-439.

**SEC. 3504. Change when brought in wrong county.**

[For earlier annotations, see code, pages 1297-9.—Ed.]

By answering after the overruling of an application for a change of place of trial the applicant does not waive error in overruling such motion. *Foss v. Cobbler*, 105-728.

Where administration is granted in a county other than that of the residence of deceased at the time of his death, it is void. In such case motion for a change of venue is not necessary. *In re King's Estate*, 105-320.

If an action to foreclose a mortgage is brought in a county where no part of the

mortgaged property is situated, it may on motion be changed to the proper county, but failure to ask for the change will be a waiver of the objection. The court is not without jurisdiction in such case. *McDonald v. Second Nat. Bank*, 106-517.

This provision as to transfer of the case to the proper county has no application where suit is brought in one county to enjoin the enforcement of a judgment rendered in another county in violation of the provisions of Code § 4364. *Hawkeye Ins. Co. v. Huston*, 89 N. W., 29.

## CHAPTER 5.

## OF CHANGE OF PLACE OF TRIAL.

**SECTION 3505. Grounds for.**

[For earlier annotations, see code, pages 1299-1302.—Ed.]

This section relates to civil actions, and not to special proceedings. *Union Bldg. & Sav. Assn. v. Soderquist*, 87 N. W., 433.

Where the showing is of prejudice in the portion of the county where the transaction involved took place, it is not sufficient. *State v. Moats*, 108-13.

The showing in a particular case, held not sufficient to require change of venue on account of prejudice likely to have been created by newspaper publications. *Alverson v. Anchor Mut. F. Ins. Co.*, 105-60.

The judge is warranted in considering matters which are of his own knowledge and conviction in the disposition of a motion, and the denial of the change for prejudice of the judge will not be disturbed

on appeal where the circumstances indicate that the denial was in the exercise of a reasonable discretion. *Petty v. Hayden*, 88 N. W., 339.

The granting or refusing of an application for change of venue is a matter largely within the discretion of the court to which the motion is addressed, and when a showing is made which is regular in form and *prima facie* sufficient, the ruling of the trial court sustaining it is rarely, if ever, reversed on appeal. The correctness of the ruling of the trial court is not to be determined by comparative count of affidavits. *Faivre v. Manderscheid*, 90 N. W., 76.

**SEC. 3509. When change perfected.**

[For earlier annotations, see code, pages 1303-4.—Ed.]

The making and transmission of the transcript is not the act, or one of the acts, which is necessary to perfect a change of venue. If the clerk gives a defective transcript it may be perfected within a reasonable time. *Faivre v. Manderscheid*, 90 N. W., 76.

When the papers transmitted are re-

ceived into the official custody of the clerk of the court to which the change is granted, and the case is entered upon the docket of that court, the court acquires jurisdiction, and an omission of the clerk to properly note such filing can be cured by order of court. *Ibid.*

**SEC. 3511. Costs of change.**

[For earlier annotations, see code, page 1304.—Ed.]

The court having failed to designate or point out the costs to be paid as a condition for granting the change of venue, it

must be assumed that there were no costs which the party was required to pay. *Faivre v. Manderscheid*, 90 N. W., 76.

## CHAPTER 6.

## OF THE MANNER OF COMMENCING ACTIONS.

## SECTION 3514. Original notice.

[For earlier annotations, see code, pages 1305-7.—Ed.]

The commencement of the action with regard to special statutory limitations is to be dated from the placing of the notice in the hands of the sheriff for service, the same rule being applicable as in case of the general statute of limitations under the provisions of Code § 3450. *Smith v. Callanan*, 103-218.

Under Code § 3450 the placing of an original notice in the hands of the sheriff for service is a sufficient commencement of the action under the statute of limitations, but the intention that the notice shall be served must be continuous, and if the sheriff re-

turns the notice as unserved, and two terms of court are allowed to elapse without further attempt to have service made, the action is to be deemed abandoned. *Richardson v. Turner*, 110-318.

The time fixed by statute as to notice, filing of pleadings, etc., is to enable the parties to prepare for trial; but by consent of parties the court may have jurisdiction to try the case at the term at which the petition is filed, although proper notice of the filing of the petition has not been given. *Rummel v. Dealy*, 112-503.

## SEC. 3515. Dismissal for failure to file petition.

[For earlier annotations, see code, page 1307.—Ed.]

Where the petition is not filed by the time fixed therefor in the original notice

the defendant is entitled to have the case dismissed. *Conley v. Dugan*, 105-205.

## SEC. 3518. Method of service.

[For earlier annotations, see code, pages 1308-9.—Ed.]

In an action against a married woman the original notice may be served by leaving a copy with her husband at his place of residence in case the wife is not found

within the county, although she may have temporarily abandoned him and is not actually residing with him at the time. *Galvin v. Dailey*, 109-332.

## SEC. 3519. Return of personal service.

[For earlier annotations, see code, pages 1309-13.—Ed.]

Where the affidavit of service appears to have been signed by the person making it, and the notary so writes the jurat as to make use of the signed name as a part of the jurat itself, this fact does not prevent the return being considered as duly signed and sworn to. *Blair v. Hemphill*, 111-226.

The statutory provisions with reference to service of notice recognize no smaller governmental subdivisions than counties, and a return of service of the original notice as having been made in a particular town does not show that town to be the residence of the person upon whom service is made. *Shoemaker v. Roberts*, 103-681.

The return of an officer as to service by leaving a copy held not to be overcome by the testimony of a witness, given many years afterward, based only upon his recollection. *Galvin v. Dailey*, 109-332.

Service of notice will be presumed from recital thereof in the judgment, and the burden is on the person attacking the judgment to overcome the presumption, which will not be done by showing facts from which merely a contrary presumption may arise, such as absence of notice from the files, or of entries in the appearance

docket and fee book. *Farnsley v. Stillwell*, 107-631.

The judgment of the court is conclusive as to whether the facts essential to jurisdiction in the particular case exist. *Applegate v. Applegate*, 107-312.

Where a return showed service on defendant's son but it did not appear that defendant was not found within the county or that a copy was left at his usual place of residence or that the son was a member of his family or over fourteen years of age, held that such return showed no service whatever, and not simply defective service. *Thompson v. Thompson*, 90 N. W., 493.

In a particular case held that evidence of want of service of notice in pursuance of which a judgment was rendered was sufficient to overcome the presumption of service arising from the rendition of the judgment and from entries on the appearance docket and fee book showing return of service, the original of the sheriff's return not being introduced in evidence. *Shehan v. Stuart*, 90 N. W., 614.

A judgment may be collaterally attacked for want of jurisdiction when there is no notice, as, for instance, where the notice is by publication without the previous fil-

ing of an affidavit as required in such cases. But where there is a notice supported by a proper preliminary proceeding, the sufficiency of which is subject to construction and upon which the court must judge of its own jurisdiction, the judgment is good until set aside in some direct proceeding. *Priestman v. Priestman*, 103-320.

Where there is an attempted service, and the question is whether the forms of law were complied with, the case is one of defective service, and not want of service. *Longueville v. May*, 87 N. W., 432.

A judgment which is void for want of service may be set aside at any time. *Spencer v. Berns*, 114-126.

#### SEC. 3524. Proof of service—patients in hospital for insane.

[For earlier annotations, see code, pages 1813-14.—Ed.]

A judgment rendered upon service of notice upon an insane person without compliance with the special provisions as to

service in such case is not absolutely void, but voidable. *Day v. Goodwin*, 104-374.

#### SEC. 3528. Service on county—presentation of claims.

[For earlier annotations, see code, pages 1314-15.—Ed.]

Where a city provides salaries for police judge and marshal, and the fees of such officers therefore become payable to the city, and such fees in criminal cases are to be paid by the county, the filing with

the county auditor of transcripts showing that such fees have been earned, is a sufficient demand against the county to enable the city to recover the fees in an action. *Des Moines v. Polk County*, 107-525.

SEC. 3529. On agent of corporation. If the action is against any corporation or person owning or operating any railway or canal, steamboat or other river craft, or any telegraph, telephone, stage, coach or car line, or against any express company, or against any foreign corporation, service may be made upon any general agent of such corporation, company or person, wherever found, or upon any station, ticket or other agent or person transacting the business thereof or selling tickets therefor in the county where the action is brought; if there is no such agent in said county, then service may be had upon any such agent or person transacting said business in any other county. [C. '73, § 2611; C. '51, § 1727.] [29 G. A., ch. 139, § 1.]

[For annotations, see code, pages 1315-16.—Ed.]

#### SEC. 3531. On municipal or other corporation.

[For earlier annotations, see code, page 1316.—Ed.]

If the notice is directed to a school district and served on the president thereof, it is sufficient to constitute notice to the district. *Haggard v. Independent School Dist.*, 113-486.

Where foreign corporations are required as a condition of doing business within a state to appoint an agent upon whom ser-

vice may be made within the state, service upon an agent appointed in attempted compliance with such statutory requirements will be valid, although it does not technically authorize the service of process upon him. *Green v. Equitable Mut. L. & End. Assn.*, 105-628.

#### SEC. 3532. On agent as to business of office or agency.

[For earlier annotations, see code, pages 1316-17.—Ed.]

It is sufficient if the principal have an office or agency in the county in which the suit growing out of or connected with the business of that office or agency is brought and service of the notice be made upon an agent or clerk employed in that office or agency. *Locke v. Chicago Chronicle Co.*, 107-390.

A non-resident corporation may be sued in any county in which it can be found and

service upon it may be made by serving an officer or agent. *Moffit v. Chicago Chronicle Co.*, 107-407.

To sustain a service on an agent or clerk under this section it must appear that the action grew out of some matter connected with the business of such agent or clerk. *Barnabee v. Holmes*, 88 N. W., 1098.

#### SEC. 3534. By publication.

[For earlier annotations, see code, pages 1218-21.—Ed.]

Where judgment is rendered by default in a divorce proceeding, on service of no-

tice by publication which does not correctly give the name of defendant nor spell

it so as to indicate the correct pronunciation, the judgment is subject to collateral attack. *Hubner v. Reickhoff*, 103-368.

The filing of an affidavit is a condition precedent to the service of notice by publication, and a judgment rendered without an appearance by the defendant served only by publication when the affidavit has not been filed is void. *Priestman v. Priestman*, 103-320.

And held, that filing of the affidavit after the first publication, although before the conclusion of the publication, was not sufficient. *Ibid.*

Where the decree recites service by publication, and the appearance docket shows that an affidavit of non-residence was filed with the petition and before the first publication, and there is evidence of witnesses that they saw the affidavit, etc., the judgment will be sustained, although the affidavit was not found on file after the judgment

was entered. *Omaha Nat. Bank v. Squires*, 113-365.

A proceeding by a subcontractor to enforce a mechanic's lien may be maintained as a proceeding *in rem* without asking a personal judgment against the principal contractor, where the principal contractor is a non-resident upon whom personal service cannot be obtained. *Simonson Bros. Mfg. Co. v. Citizens' State Bank*, 105-264.

Personal service of notice outside of the state gives the court jurisdiction to render judgment *in rem* in an attachment suit. *Clark v. Tull*, 113-143.

The rule that a judgment without personal service against a non-resident is only good so far as it affects the property which is taken or brought under the control of the court or tribunal, is applicable also where a city attempts to enforce by personal judgment an indebtedness for special assessments on his property. *Dewey v. Des Moines*, 173 U. S., 193.

### SEC. 3541. Mode of appearance—when required.

[For earlier annotations, see code, pages 1323-5.—Ed.]

An appearance by the assignee in insolvency of a foreign corporation may by comity be recognized and will bind the corporation although such assignee has no legal authority beyond the extent of the jurisdiction in which he is appointed. *State Bank v. McElroy*, 106-258.

The court having jurisdiction of the subject matter acquires jurisdiction of the case by appearance. *Applegate v. Applegate*, 107-312.

By appearance to an action, even though for a special purpose, jurisdiction to determine the case upon its merits is conferred upon the court. *Locke v. Chicago Chronicle Co.*, 107-390; *Moffit v. Chicago Chronicle Co.*, 107-407.

Appearance by motion to dismiss for want of jurisdiction, where service has been made on an alleged agent, is sufficient to give the court jurisdiction in case the motion is overruled. *Teller v. Equitable Mut. L. Assn.*, 108-17.

Judicial business may be transacted on the Fourth of July and a witness may be punished for contempt in not appearing on that day in response to a subpoena. *Chambers v. Oehler*, 107-155.

Sunday or any other day mentioned by this section as a holiday should not be excluded in estimating the three days within which a motion for new trial is to be filed. *German Sav. Bank v. Cady*, 114-228.

### SEC. 3543. Notice of action pending.

[For earlier annotations, see code, pages 1325-7.—Ed.]

Where without authority of one party a case was marked on the judge's calendar as settled, and a corresponding entry was made in the court record, but subsequently a trial notice was filed in the case and it was put on the calendar for the succeeding term, held that one who purchased real property involved in such action after the service of the trial notice was affected with notice of the pendency of the action. *Furry v. Ferguson*, 105-231.

A purchaser at execution sale under a judgment takes subject to any right subsequently established in an action already pending, to have the premises declared a homestead and exempt from sale under such judgment. *McClelland v. Bennett*, 106-74.

The primary object of the rule of *lis pendens* is to keep the property within the

power of the court until final judgment or decree shall be entered, and thus to enable the courts to give force and effect to such judgments. In the absence of statutory provisions, the notice involved in the pendency of the action continues until the suit is determined by final decree, or until it is suspended by a failure to make what is called a "full prosecution." An appeal from the final judgment of an inferior court continues the *lis pendens* during the pendency of the appeal. It has also been held that where there is an apparent neglect to prosecute, a reasonable excuse for the delay complained of is always available to keep the *lis pendens* alive. Full prosecution exists so long as the action is pending and the court has complete jurisdiction over the matter in controversy. Under the provisions of this section *lis pendens* com-

mences when the petition has been filed and continues while the action is pending. *Olson v. Leibpke*, 110-594.

One purchasing at execution sale is

bound to take notice of an action as to the title to the property pending against the owner. *Bacon v. Early*, 90 N. W., 353.

## CHAPTER 7.

### OF JOINDER OF ACTION.

#### SECTION 3545. When permitted—issues tried separately.

[For earlier annotations, see code, pages 1327-8.—Ed.]

Causes of action may be joined where each may be prosecuted by the same kind of proceeding, by the same party, in the same right, and if suit on all may be brought and tried in the same county. *Chambers v. Oehler*, 104-278.

An action by a wife for damages by reason of sales of liquor to her husband cannot be joined with an action to recover penalty for sales to minors or habitual

drunkards. *Carrier v. Bernstein*, 104-572.

It is not proper to join with an action on a bond to indemnify against the enforcement of a decree a cause of action on the decree itself. *Prader v. National Accident Assn.*, 107-431.

It is proper to join in one action claims on tort and on contract. *Devin v. Walsh*, 108-428.

#### SEC. 3547. Motion to strike out.

[For earlier annotations, see code, page 1329.—Ed.]

By failing to appear, a defendant waives objection to misjoinder of actions. *McDonald v. Second Nat. Bank*, 106-517.

#### SEC. 3548. Misjoinder waived.

[For earlier annotations, see code, page 1329.—Ed.]

Misjoinder of causes of action must be taken advantage of by motion. If the pleading is not so attacked the objection

is waived. *Lull v. Anamosa Nat. Bank*, 110-537.

## CHAPTER 8.

### OF PLEADING.

#### SECTION 3551. Motions and demurrers.

[For earlier annotations, see code, pages 1329-30.—Ed.]

The provision that motions assailing pleadings must be in writing may be waived and the opposite party will be deemed to have acquiesced therein where without objection the motion is made orally and taken down by the official stenographer. *Fischer v. Johnson*, 106-181.

Failure to object to the filing of a motion as not within the proper time may be urged in connection with the consideration of the

motion on its merits, and need not be taken at the time the motion is filed. *Turley v. Griffin*, 106-161.

A motion to strike from the files another motion is wholly unnecessary. The motion may be overruled if not properly introduced, although no specific objection to it on that ground is made. *German Sav. Bank v. Cady*, 114-228.

#### SEC. 3552. Subsequent pleadings.

[For earlier annotations, see code, page 1330.—Ed.]

While a party after his pleading has been held defective is entitled until noon of the next day in which to amend or plead over, yet if without objection he allows the

court to proceed before the expiration of that time without so amending or pleading over he cannot complain on appeal. *Chase v. Wright*, 90 N. W., 357.

**SEC. 3559. Petition—what to contain—counts—divisions—paragraphs.**

[For earlier annotations, see code, pages 1332-41.—Ed.]

**Ultimate facts.** The pleading should state ultimate facts and not the evidence. *Johnson v. Chicago, R. I. & P. R. Co.*, 107-1.

A paragraph in a petition which is in the nature of a statement of evidence not relevant to any issue in the case and not of ultimate and material facts may properly be stricken out on motion. *Tisdale v. Major*, 106-1.

Ultimate facts only and not evidence of them are to be stated in the petition; but, held, that allegations that the placing of a trolley pole in front of plaintiff's premises was without necessity and to annoy plaintiff and injure and depreciate the value of his property, and that it was an obstruction to the enjoyment of his property and had caused depreciation therein, were sufficient to set out a cause of action, in the absence of a motion for more specific statement. *Snyder v. Ft. Madison Street R. Co.*, 105-234.

Where statutes of another state relied on are merely evidence of ultimate facts they need not be pleaded, but can be introduced in evidence in support of the ultimate fact which is properly pleaded. *Green v. Equitable Mut. L. & End. Assn.*, 105-628.

When a material fact necessary to a recovery is omitted from a petition it is said that it does not state a cause of action. *Box v. Chicago, R. I. & P. R. Co.*, 107-660.

**Negligence.** An allegation of negligence in a mine owner in allowing the roof of an entry to be in a dangerous condition with knowledge thereof, is sustained by evidence that it had been in a dangerous condition for such length of time as that knowledge thereof would be imputed to defendant. *Blazenic v. Iowa & W. Coal Co.*, 102-706.

**Freedom from contributory negligence.** Plaintiff, in an action to recover damages for malpractice of a physician should allege freedom from contributory negligence, and, having failed to do so, the defendant may raise the objection by motion in arrest of judgment. *Decatur v. Simpson*, 88 N. W., 839.

That the petition does not allege freedom of plaintiff from contributory negligence in a case where such fact should be alleged may be raised by motion in arrest of judgment. *Kleineck v. Reiger*, 107-325.

Where defendant in an action for personal injuries sets up the contributory negligence of the plaintiff, the plaintiff who intends to rely upon the fact that defendant might have avoided the injury, in the exercise of reasonable care after the negligent act of the plaintiff became known to him, should allege such matter by way of reply. *Ford v. Chicago, R. I. & P. R. Co.*, 106-85.

**Fraud.** In alleging fraud committed by an agent it is not necessary to set up the fact of agency, nor that of ratification. The fraud in such case may be pleaded as that of the principal. *Higbee v. Trumbauer*, 112-74.

**Payment.** A pleading which contains an allegation that a given sum of money is "substantially if not wholly" paid does not allege with sufficient definiteness that such amount has been fully paid. *Hardin County v. Wells*, 108-174.

**Estoppel.** Matters in estoppel to be available as such must be specially pleaded. *Spencer Co. v. Papach*, 103-513; *Kingsbury v. Chicago, M. & St. P. R. Co.*, 104-63.

**Waiver.** Where facts are alleged by way of waiver they cannot be proven to establish the making of a contract. A contract relied upon should be pleaded and a party should not be allowed to plead it one way and prove it to be different. *Kinkead v. McCormick Har. Mach. Co.*, 106-222.

Where a passenger sued to recover damages for being put off a train on account of insufficiency of his ticket, held that if he relied on waiver of the conditions of the ticket such waiver must be pleaded. *Trezona v. Chicago G. W. R. Co.*, 107-22.

Waiver of breach of conditions in a policy of insurance must be pleaded. *McCoy v. Iowa State Ins. Co.*, 107-30.

In an action on an insurance policy, allegation that due notice was given necessarily implies proofs of loss, and waiver of proofs must be specially pleaded. *Parsons v. A. O. U. W.*, 108-6.

A waiver which is relied on must be pleaded. *Kinkead v. McCormick Har. Mach. Co.*, 106-222; *Murray v. Thiessen*, 114-657.

**Implied contract.** Under allegations showing implied promise to pay for services, no recovery can be had under breach of an express agreement. *Duncan v. Gray*, 108-599.

**Want of notice.** Where in an action on a certificate of insurance in a mutual accident association it was alleged that plaintiff had complied with all the conditions and provisions of the articles of incorporation and by-laws of said association on his part to be kept and performed, and defendant interposed only a general denial, held, that defendant could not rely on failure of the plaintiff to prove the giving of notice as required by the articles. *Hart v. National Masonic Acc. Assn.*, 105-717.

**Custom.** A custom relied upon as affecting a contract must be pleaded. *Eller v. Loomis*, 106-276.

**Entire cause of action.** A party cannot split up his cause of action. When

he brings suit to claim a lien he must present all the facts entitling him thereto, and will not be allowed in one case to assert a mortgage lien, and when defeated with reference thereto, claim a general equitable lien in another action against the same property for the same indebtedness. *Zion Church v. Parker*, 114-1.

**Issues not raised.** As parties may by amendment introduce new issues, or make certain those intended, their interpretation of the pleadings, when clearly manifested, is uniformly adopted by the courts. Permitting the introduction of evidence on an issue not specifically pleaded, without objection, obviates the necessity of its formal presentation. *Fenner v. Crips*, 109-455.

**Prayer.** A prayer that plaintiff have "such other relief as would be proper in the premises" does not convert a petition

to recover possession of personal property, or the value thereof, into an equitable action, but where the petition, which seemed otherwise to be based on a right to recover at law, also averred a trust arising under the facts for plaintiff's benefit, held that it sufficiently appeared that the petition was in equity. *Stokes v. Sprague*, 110-89.

A prayer that a deed be set aside for fraud, or, if it be held valid, that the contract price be recovered and a vendor's lien given, does not involve such inconsistent or contradictory relief as to be improper. *Hogueland v. Arts*, 113-634.

It is not necessary that there be a prayer for costs. *Reed v. Corrigan*, 114-638.

The judgment must follow the prayer for relief and cannot be extended beyond it. *Browne v. Kiel*, 90 N. W., 624.

### SEC. 3561. Demurrer—causes of.

[For earlier annotations, see code, pages 1341-6.—Ed ]

A question as to defect of parties is not jurisdictional, and such a defect is waived unless raised by demurrer or in other proper manner. *Fullam v. Drake*, 105-615.

The defect of parties which will afford ground for demurrer is the non-joinder of those who should have been joined, either as plaintiffs or defendants. A misjoinder can be taken advantage of only by motion. *Dolan v. Hubinger*, 109-408.

Failure of plaintiff suing as a corporation to allege corporate capacity may be taken advantage of by way of demurrer, but cannot be raised after judgment. *Calnan Construction Co. v. Brown*, 110-37.

An objection to evidence because no cause of action is stated in the petition is not recognized in practice. It is a sort of oral demurrer for which there is no authority. *Boyer v. Commercial Building Inv. Co.*, 110-491.

The defendant by not moving to strike an amendment to the petition, after the original pleading has been held to be defective on demurrer, waives the right to claim that the amendment is merely the restatement of the petition which has been held defective. *Koboliska v. Swehla*, 107-124.

### SEC. 3562. How specific.

[For earlier annotations, see code, pages 1346-7.—Ed ]

A demurrer is not a pruning hook, and cannot be used to trim out immaterial and irrelevant matter. This must be done by motion. *In re Estate of McMurray*, 107-648.

In a special proceeding, the demurrer

must specify and number the grounds of objection to the pleading. *Ibid.*

A demurrer to a petition in an action at law, stated in the terms of the fifth division of the preceding section, is not sufficient, and should be overruled. *Stokes v. Sprague*, 110-89.

### SEC. 3563. Objection raised by answer—arrest of judgment.

[For earlier annotations, see code, pages 1347-51.—Ed.]

Objection to improper joinder of causes of action is waived by answering. *Keller v. Strong*, 104-585.

The defense of the statute of limitations is an affirmative one, and is waived if not pleaded. When not pleaded such defense should not be submitted to the jury, even though supported by facts appearing in the record. *McDonald v. Bice*, 113-44.

Where defendant is allowed to introduce, without objection, under the general issue, evidence of a defense that could be properly offered only under a special defense pleaded, plaintiff should be deemed to have

waived the objection to the insufficiency of the pleading. *Beach v. Wakefield*, 107-567.

A party does not by pleading over waive his right to attack the pleading of the adverse party at a subsequent time in the progress of the case, but he may raise the question of the sufficiency of the pleading by motion in arrest of judgment, or to direct a verdict. If, however, he fails to make objection this way he cannot have the ruling reviewed on appeal. *Hawkeye Loan & Brokerage Co. v. Gordon*, 88 N. W., 1081.

If the pleadings do not present a cause

of action or defense, and the question has been properly raised in the court below, and a ruling had thereon, the question may be reviewed upon proper assignment of error in an equity case, notwithstanding the fact that the party may have pleaded over and had a trial on the merits. *Ibid.*

Plaintiff appealing from judgment against him on demurrer to his petition on the ground that it does not state facts sufficient to show a cause of action, cannot complain of the sustaining of a motion complied with by him requiring him

to make his petition more specific. *Sigmond v. Bebbler*, 104-431.

Where plaintiff in an action for personal injuries fails to allege freedom from contributory negligence, and defendant demurs to the petition on that ground and the demurrer is overruled, defendant may still raise the objection by a motion in arrest of judgment, and if the plaintiff does not offer to cure such defect by taking advantage of Code § 3760, the court may properly sustain the motion. *Decatur v. Simpson*, 88 N. W., 839.

### SEC. 3564. Demurrer to one of several causes—effect of demurrer and ruling.

[For earlier annotations, see code, page 1351.—Ed.]

The provision of 25 G. A., ch. 96 that no pleading should be held sufficient on account of the failure to demur thereto, held not to entitle a party to urge in the supreme court objections to a pleading not raised in the trial court. *Reed v. Muscatine*, 104-183; *Wood v. Dunham*, 105-701; *Lacy v. Kossuth County*, 106-16.

An objection to the petition not raised by answer or demurrer is not deemed waived under the present Code. *Pierson v. Independent School Dist.*, 106-695.

The provision as to the effect of the overruling of a demurrer was not designed to permit a review of the ruling on the demurrer which had been overruled, where the party demurring had afterwards filed an answer, or replied, but to provide that the ruling should not have the effect of an adjudication, and to permit the party demurring unsuccessfully to question the sufficiency of the pleading in other ways during the progress of the trial, as by mo-

tion to direct a verdict, or in arrest of judgment. In such a case the party, by pleading over, waives his right to complain of the ruling on his demurrer, but does not waive his right to attack the pleading on the grounds upon which his demurrer was founded at any subsequent time in the progress of the case. *Frum v. Keeney*, 109-393.

Notwithstanding the provisions of 25 G. A., ch. 96 (now embodied in the last sentence of this section), questions not raised in the court below will not be considered on appeal. *Hough v. Gearen*, 110-240.

Mere failure to demur to a defective petition does not prevent defendant from raising the objection in some other way. But he cannot allow the case to be tried on the theory that the petition is sufficient, and then on exceptions to the giving of instructions on the issue raise the question as to whether a cause of action is stated. *Enix v. Iowa Cent. R. Co.*, 114-508.

### SEC. 3565. Joinder in demurrer—answering, amending or pleading over.

[For earlier annotations, see code, pages 1351-4.—Ed.]

If a party, after an adverse ruling on demurrer or on motion, pleads over or secures time to plead, he by so doing waives the error in the ruling, and it has likewise been held that where the law tenders an issue without the filing of further pleadings, he who would take advantage of an order overruling a demurrer must stand upon the pleading in order to have his case reviewed; but a defendant who demurs to plaintiff's petition and after the overruling of the demurrer does not ask for further time to plead over, files no other pleading in the case and makes no further appearance, is deemed to stand on the demurrer without the record showing a formal election. If it affirmatively appears that the unsuccessful party did not waive the error under the ruling that is sufficient. *Denby v. Fic*, 106-299.

Where judgment has been rendered against plaintiff whose petition has been

held insufficient on demurrer, and who has elected to stand on his petition and not to amend, such judgment constitutes a final adjudication. *Gregory v. Woodworth*, 107-151.

By answering after the overruling of a motion for more specific statement defendant waives error in the ruling on the motion. *Hurd v. Ladner*, 110-263.

By pleading over after a ruling sustaining a demurrer to his petition, plaintiff waives the error, if any, but the ruling does not constitute an adjudication, and the same question may be presented in other ways. *Geiser Mfg. Co. v. Krogman*, 111-503.

In general judgment goes against the party whose pleading is held insufficient on demurrer only when he elects to stand on his pleading, or when, having asked leave to amend, he is in default for not

doing so. *Williams v. Williams*, 88 N. W., 1057.

Where defendant does not stand on his

answer to which a demurrer has been overruled, but pleads over, he waives the ruling. *Frick v. Kabaker*, 90 N. W., 498.

### SEC. 3566. Answer—what to contain—distinct defenses.

[For earlier annotations, see code, pages 1354-9.—Ed.]

Denial. In an action for libel where plaintiff alleges the falsity of the statements, defendant may under general denial introduce evidence of their truth. *Locke v. Chicago Chronicle Co.*, 107-390; *Moffitt v. Chicago Chronicle Co.*, 107-407.

Under a general denial of a settlement, any evidence should be received which tends to show that no settlement was made. *Beach v. Wakefield*, 107-567.

A general or specific denial as authorized by the statute may be introduced without being objectionable as a conclusion. While conclusions may not be pleaded by way of affirmative averment, there is no such objection to a general or specific denial. *Provident Bank Stock Co. v. Schaffer*, 110-440.

**New matter: affirmative defenses.** Where the plaintiff's petition shows on its face that the claim is not barred by the statute of limitations, the question can be raised by defendant only by an answer. *Goring v. Fitzgerald*, 105-507.

**Confession and avoidance.** While allegations by way of avoidance must be coupled with a confession of plaintiff's cause of action, it is sufficient if the confession be by implication. *Jackson v. Independent School Dist.*, 110-313.

**Special defenses.** In an action for malicious prosecution, evidence of advice of counsel as rebutting malice and want of probable cause, is admissible without

being specially pleaded. *McAllister v. Johnson*, 108-42.

If it is desired to rely upon facts as an affirmative defense, they should be pleaded in avoidance. *Kingsbury v. Chicago, M. & St. P. R. Co.*, 104-63.

**Inconsistent defenses.** While a defendant has the right to plead the same defense as many times as he sees fit, he has the right to prove it but once, and if this right is preserved to him he cannot complain of the action of the trial court in striking out portions of his answer. *Shambaugh v. Current*, 111-121.

Where one of the divisions of an answer admits defendant's liability, plaintiff is entitled to judgment, although in other divisions of the answer defendant's liability is controverted. *Burns v. Chicago, Ft. M. & D. M. R. Co.*, 110-385.

Defendant in an action for goods sold and delivered may plead rescission and also set up a counterclaim for breach of warranty. He is not required to elect. *Thorson & Cassidy Co. v. Baker*, 107-49.

**Partial defense.** A demurrer cannot be interposed to allegations in an answer not pleaded in themselves as a complete defense, but as material with other allegations in making out a defense. *Seaton v. Grimm*, 110-145.

Even matter in mitigation should be specially pleaded as a partial defense, and cannot be proven under a general denial. *Vierling v. Binder*, 113-337.

### SEC. 3570. Counter-claim—how stated—what may constitute.

[For earlier annotations, see code, pages 1359-62.—Ed.]

In an action brought in a representative capacity a counterclaim against the plaintiff as an individual cannot be interposed. *Headington v. Smith*, 113-107.

The counterclaim proper presents matter upon which an original action might have been brought in defendant's favor. *Bardes v. Hutchinson*, 113-610.

A counterclaim may or may not be pleaded in an action as the defendant shall elect. And held that the vendee of property, buying under a guaranty, might plead breach of the guaranty as a defense in an action for the balance of the purchase money, and afterwards in an independent action recover damages sustained by reason of the seller's breach. *Jones v. Witousek*, 114-14.

If the matter of set-off or counterclaim is presented and passed upon in the suit it is barred by the judgment, if not, defendant may make it the subject of a separate and distinct action. *Ibid.*

Inasmuch as the landlord in an action for an attachment for rent cannot join other causes of action against the tenant, if the tenant sets up a counterclaim plaintiff may in reply interpose any matter of set-off which he may have as against the counterclaim. *Illsly v. Grayson*, 105-685.

After trial in an equity case, and remanding the case for further proceedings, it is not proper to allow the introduction of a counterclaim which sets up a right of recovery at law, and which does not grow out of the same transaction. *Allen v. Davenport*, 87 N. W., 743.

A claim for repayment of money paid for intoxicating liquors illegally sold (Code § 2423) exists from the time such payment was made, and nothing but a demand is necessary to mature it, and therefore such a claim may be introduced by way of counterclaim, although the demand for repayment has not been made until after the bringing of the action in

which the counterclaim is sought to be introduced. *Brown v. Wieland*, 89 N. W., 17.

A claim against an estate, acquired after the death of the intestate, cannot be set up as a counterclaim in an action by the administrator. *Sullivan v. Nicoulin*, 113-76.

To be available as a counterclaim the claim must have been owed to the defendant at the time of the commencement of the action, and it is not enough that the debt belonged to a partnership of which he was a member. *Ibid.*

### SEC. 3576. Reply—when necessary.

[For earlier annotations, see code, pages 1364-5.—Ed.]

A reply introducing a new cause of action should be stricken out on motion. *Hunt v. Johnston*, 105-311.

Where in an action for personal injuries defendant pleads contributory negligence of the plaintiff, the plaintiff, desiring to rely upon the fact that defendant might by reasonable care have prevented the injury to plaintiff after plaintiff's contributory negligence became apparent, should plead such fact in the reply. *Ford v. Chicago, R. I. & P. R. Co.*, 106-85.

Matter in avoidance of facts alleged in the answer should be pleaded in a reply. *Pitstick v. Osterman*, 107-189.

The averment of settlement in an answer is denied by operation of law. If, however, the plaintiff desires to impeach such settlement on account of fraud or mistake, such

matter should be set up in a reply. *Stomne v. Hanford Prod. Co.*, 108-137.

A reply should not be stricken out on motion for being inconsistent with the petition, where no inconsistency appears on the face of the reply, though such inconsistency may become apparent under the evidence. *Keairnes v. Durst*, 110-114.

Where one sets up matter of avoidance in the reply it is not necessary that he couple it with a denial. The law denies all affirmative allegations in the answer, save where a counterclaim is pleaded. *Parno v. Iowa Mut. Ins. Co.*, 114-132.

Facts recited in a reply are not to be treated as constituting a cause of action, either of themselves or in connection with matters stated in the petition, but only as avoiding the defense alleged in the answer. *Cedar Rapids Water Co. v. Cedar Rapids*, 90 N. W., 746.

### SEC. 3577. Statements of.

[For earlier annotations, see code, pages 1365-6.—Ed.]

Allegations of the answer being denied by operation of law, the burden of proving the same is upon the defendant, notwith-

standing confession and avoidance pleaded in the reply. *Parsons v. A. O. U. W.*, 108-6.

### SEC. 3581. By corporation.

Although the defendant in the petition may be designated as a partnership, yet if it is in fact a corporation, and is served as a corporation the court acquires jurisdiction. *Taft Co. v. Bounani*, 110-739.

A corporation may verify its answer denying the genuineness of the corporate signature by the oath of its secretary. *Marshall Field Co. v. Oren Ruffcorn Co.*, 90 N. W., 618.

### SEC. 3588. Failure to verify.

[For earlier annotations, see code, page 1368.—Ed.]

Failure to verify a petition of forcible entry and detainer will be waived if not

taken advantage of in the trial court. *Herkimer v. Keeler*, 109-680.

### SEC. 3591. Amendments not verified.

[For earlier annotations, see code, page 1368.—Ed.]

The court may permit an amendment to be filed without verification. *Thompson v. Brown*, 106-367.

Section applied. *Boos v. Dulin*, 103-331.

### SEC. 3592. Pleading in slander and libel.

[For earlier annotations, see code, page 1369.—Ed.]

Extrinsic facts need not be alleged in an action for slander to show that the lan-

guage charged was spoken in a defamatory sense. *Craver v. Norton*, 114-46.

### SEC. 3593. Matter in mitigation—justification.

[For earlier annotations, see code, pages 1369-70.—Ed.]

Matters in mitigation cannot be proven unless specially pleaded. *Craver v. Norton*, 114-46; *Flam v. Lee*, 90 N. W., 70.

**SEC. 3594. Intervention.**

[For earlier annotations, see code, pages 1371-2.—Ed.]

In a proceeding before the board of supervisors for the remission of a mulct tax, there is no right of intervention by a mortgagee of the premises on which the tax has been levied for the determination of the question whether his mortgage is prior to the lien of the tax, nor can such question be raised in the district court on appeal from the action of the board. *David v. Hardin County*, 104-204.

It is the policy of the law to permit conflicting claims of priority growing out of a single mortgage to be settled in one action and such a result may be secured by intervention of parties interested in the property. *Cooper v. Mohler*, 104-301.

An assignee for the benefit of creditors, to whom has been transferred a right to recover on an attachment bond, may intervene in the original action for the purpose of recovering on such bond. *Ringgen Stove Co. v. Bowers*, 109-175.

An assignee of the claim on which the action is based is not entitled to inter-

vene. He may allow the action to proceed in the name of the assignor, or may have himself substituted. *Bank of Commerce v. Timbrell*, 113-713.

Where the wife in a proceeding for divorce and alimony asked to have a conveyance of property from her husband to a third party set aside as fraudulent, and after a dismissal of the action by plaintiff was filed, and before any order of dismissal had been entered, attorneys of the wife sought to intervene, asking to have their claims for attorneys' fees enforced against the land, held that they had no such standing with reference to the controversy as to be entitled to intervene, and that at any rate the application was too late. *Keehn v. Keehn*, 88 N. W., 957.

The intervenor in a landlord's attachment proceeding who claims title to the property cannot recover damages for being deprived of the use thereof. *Ohde v. Hoffman*, 90 N. W., 750.

**SEC. 3595. Decision—no delay—costs.**

[For earlier annotations, see code, page 1372.—Ed.]

The provisions of this section as to delay refer to delay of trial, and not to such delay as may result from an immediate trial. If the intervenor, by his action, does

not occasion any postponement, he is not chargeable with delay resulting from the trial of his petition of intervention. *Ringgen Stove Co. v. Bowers*, 109-175.

**SEC. 3597. Variance—amendments.**

[For earlier annotations, see code, pages 1372-3.—Ed.]

Under an allegation of damages by trespass and taking property the plaintiff may recover on the basis of implied contract for the value of the property taken. *Harrison v. Palo Alto County*, 104-383.

A variance between allegations and proof which does not mislead the opposite party is immaterial. *Harward v. Davenport*, 105-592.

Objection cannot be made to the allowing of an amendment on the ground of surprise when the evidence which may be introduced thereunder would have been admissible under the original pleading. *Thompson v. Brown*, 106-367.

As the parties by amendment may introduce new issues, or make certain those intended, their interpretation of the plead-

ings, when clearly manifested, is uniformly adopted by the courts. Thus, permitting the introduction of evidence on an issue not specially pleaded, without objection, obviates the necessity of its formal presentation. *Fenner v. Crips*, 109-455.

Superfluous allegations of the petition may properly be disregarded. Plaintiff is only bound to prove so much of the matter alleged as is necessary to make out his cause of action. *Russell v. Holder*, 89 N. W., 195.

Where the case goes to trial without objection on a cause of action not set up in the petition but which is supported by evidence, the defendant cannot complain of the defect in the petition. *Shoemaker v. Turner*, 90 N. W., 709.

**SEC. 3599. Failure of proof.**

[For earlier annotations, see code, page 1373.—Ed.]

Although plaintiff in an action for assault and battery alleges malice which is not necessary to be proven in such an

action, he may recover without malice being shown. *Reitzenstein v. Clark*, 104-287.

**SEC. 3600. Amendments allowed.**

[For earlier annotations, see code, pages 1374-80.—Ed.]

Right to amend. Amendments are allowed with great liberality, and the mere

fact that they are filed without leave is no ground for striking them from the files

where the amendment is such an one as should have been allowed had permission been asked to file it *West Side Lumber Co. v. Hathaway*, 89 N. W., 35.

Under the code system of pleading no litigant should be denied relief because of an error in the mere form of the action, when he has the right by amendment to adopt that appropriate to the relief prayed. The mere method should not obscure the results to be obtained. *Cox Shoe Co. v. Adams*, 105-402.

Therefore, held, that in an action of replevin wherein it appeared that the plaintiff was entitled to equitable relief, he should be allowed to amend, asking such relief, and have the case transferred to the proper calendar. *Ibid.*

The clause, "When the amendment does not change substantially the claim or defense" has reference solely to "conforming the pleadings or proceedings to the facts proved," and does not limit the portion of the section relating to the correction of a mistake in the name of the party, or a mistake in any other respect, and held that an amendment to take a cause of action out of the statute of limitations was properly allowed. *Taylor v. Taylor*, 110-207.

Statutes authorizing amendments are to be liberally construed. *Ibid.*

In a particular case held that the court did not abuse its discretion in allowing an amendment. *Weiland v. Ehlers*, 107-186.

Within what time. Where an application was not made for leave to file an amendment to a petition for the purpose of making it conform to the evidence until several days after the verdict was rendered, held, that the action of the court in refusing to allow such amendment would not be reversed on appeal. *Ankrum v. Marshalltown*, 105-493.

While a great liberality should be shown by the courts in allowance of amendments that are in furtherance of justice, the right to amend is not absolute and attorneys should not be encouraged to wait until the last moment before presenting their cases. If the amendment is not filed until the commencement of the trial the exercise of discretion by the trial court in striking the amendment from the files will be sustained. *Emerson v. Converse*, 106-330.

The discretion of the court in disregarding an amendment on the ground that it was filed too late will not be interfered with on appeal. *Burkhardt v. Burkhardt*, 107-369.

After the conclusion of the evidence, and before the opening of the arguments to the jury, a party may be allowed to amend his pleadings to correspond to the proofs. *Taylor v. Star Coal Co.*, 110-40.

An amendment filed after verdict, raising an entirely new issue, may be stricken out on motion. *Shawyer v. Chamberlain*, 113-742.

An issue tendered by an amended answer, setting up want of consideration in a written contract sued upon, may be considered, although the amendment is not filed until after motion is made to direct a verdict, the ruling of the court allowing such amendment not being attacked. *Beaty v. Carr*, 109-183.

Where an amendment to an answer tendered an entirely new and distinct issue after the case had been once tried, and was offered at the conclusion of defendant's evidence upon the second trial, no good reason appearing for not having filed it before that time, held that it was properly refused. *National Horse Importing Co. v. Novak*, 105-157.

After a final submission, either before or after reversal on appeal, there is no good reason for opening the case for the purpose of allowing the introduction of a new cause of action by way of counterclaim, not growing out of the same transaction, and which may quite as well be investigated and decided in a separate proceeding. *Allen v. Davenport*, 87 N. W., 743.

New cause of action. Where, in an action to recover for negligence, one ground of negligence is stated in the petition, and another in an amendment thereto, the cause of action stated in the amendment will be barred if barred when the amendment is filed, although not barred when the action was commenced. *Box v. Chicago, R. I. & P. R. Co.*, 107-660.

Where a substitute petition sets up a cause of action, of the same nature, but not founded on the same facts, the cause of action is not to be deemed the same, and if the substituted petition is not filed within the statutory period, the cause of action therein pleaded is to be deemed barred. *Brooks v. SeEVERS*, 112-480.

An amendment to a petition in an attachment suit may set up a new ground of attachment. *Emerson v. Converse*, 106-330.

The question whether plaintiff may amend his petition setting up a different cause of action should be raised by motion to strike, and if such motion is sustained, the plaintiff should have the opportunity allowed by statute to cure the defect in his petition by further amendment. It is not proper in such case to render judgment against the plaintiff without the lapse of the statutory period allowed for further pleading. *Williams v. Williams*, 88 N. W., 1057.

New parties. To save an action from abating, plaintiff should be allowed, on request, to have proper parties substituted before the court directs a verdict for the defendant on the ground that plaintiff is not the proper party to sue. *Hook v. Garfield Coal Co.*, 112-210.

Substitute. Where a pleading has been superseded by a subsequent pleading, filed as a substitute, the former pleading cannot be used for any purpose on the trial

without being introduced in evidence. *Longley v. McVey*, 109-666.

It is only when the original pleading has been superseded by a subsequent pleading that the averments of such original pleading are not to be taken against the pleader unless the pleading is introduced in evidence. *Burns v. Chicago, Ft. M. & D. M. R. Co.*, 110-385.

A pleading which has been superseded or withdrawn cannot be submitted to the jury to prove an admission contained therein unless it is introduced in evidence. *Marshall Field Co. v. Oren Ruffcorn Co.*, 90 N. W., 618.

The fact that averments of a substituted petition are inconsistent with those of the previous pleading is not a ground of demurrer. *Williams v. Williams*, 88 N. W., 1057.

Pleadings superseded remain a part of the record, but they cannot be read or commented on in the trial unless formally introduced in evidence. *Ibid.*

An amended pleading may appear to be and be treated as a substitute. *In re Estate of McMurray*, 107-648.

**Must be substantial.** It is proper to strike out a pleading, even though filed as a substitute for all previous pleadings, which is in substance a mere repetition of allegations which have been held insufficient on a demurrer to a former pleading in the same case. *Hoyt v. Beach*, 104-257.

An amended and substituted petition, restating what has been previously pleaded, may be stricken out on motion. *Curt v. Foehler*, 113-597.

### SEC. 3603. How amendment made.

[For earlier annotations, see code, pages 1381-2.—Ed ]

An amended petition may be an essentially different pleading from an amendment to a petition, and may clearly appear to be

intended as a substitute. *In re Estate of McMurray*, 107-648. And see notes to Code § 3600 in this Supplement.

### SEC. 3604. Interrogatories annexed to pleading.

[For earlier annotations, see code, page 1382.—Ed ]

The statutory provision requiring answers by the opposite party to interrogatories attached to the pleading are applicable to corporations as well as to individuals. The answers in such cases are to be made by the proper agent of the corporation. *Blair v. Sioux City & P. R. Co.*, 109-369.

Interrogatories may be attached to an amendment to a pleading, and it is within the sound discretion of the court to permit such amendment at any time during the trial. *Ibid.*

It is not necessary to submit interrogatories which do not call for ultimate facts nor for answers which would necessarily control the verdict. *Thompson v. Brown*, 106-367.

It is proper to strike out interrogatories proposed in an amended petition where it is manifest that to permit them to stand would necessarily postpone the trial, and plaintiff offers no excuse for the delay in propounding them. *Theis v. Chicago & N. W. R. Co.*, 107-522.

### SEC. 3609. How verified.

[For earlier annotations, see code, page 1388.—Ed ]

Where the answers to interrogatories made by the officers of a corporation in a case against the corporation show on their face that they are not made in good faith, and that, although the officers making the answers have not personal knowledge of the facts inquired about, they might have acquired such knowledge from the records and books of the corporation, accessible to

them, such answers may be stricken out and the penalty for failure to make proper answers may be enforced. *Blair v. Sioux City & P. R. Co.*, 109-369.

The pleading of a corporation may be verified by the oath of its proper officer. *Marshall Field Co. v. Oren Ruffcorn Co.*, 90 N. W., 618.

### SEC. 3615. Evidence under denial.

[For earlier annotations, see code, page 1384.—Ed ]

A custom relied upon as affecting a contract cannot be proven under a general denial but must be pleaded. *Eller v. Loomis*, 106-276.

In an action for criminal conversation the defendant cannot, under general denial,

prove consent or connivance of the husband to the improper relations with the wife. Such facts should be pleaded by way of special defense. *Morning v. Long*, 109-288.

**SEC. 3618. Sham defenses—redundant matter.**

[For earlier annotations, see code, pages 1384-5.—Ed.]

The remedy for getting rid of immaterial and irrelevant matter is by motion. *In re Estate of McMurray*, 107-648.

or frivolous cannot be interposed by demurrer. *Williams v. Williams*, 88 N. W., 1057.

The objection that a pleading is sham

**SEC. 3620. Inconsistent defenses—verification.**

[For earlier annotations, see code, pages 1285-6.—Ed.]

Defendant in an action for goods sold and delivered may plead rescission and also set up a counterclaim for breach of warranty. He is not required to elect. *Thorson & Cassidy Co. v. Baker*, 107-49.

**SEC. 3622. What deemed admitted.**

[For earlier annotations, see code, pages 1388-8.—Ed.]

Allegations of the petition which are not denied are to be treated as true. *Kent v. Muscatine, N. & S. R. Co.*, 88 N. W., 935.

**SEC. 3623. Account—bill of particulars.**

[For earlier annotations, see code, page 1388.—Ed.]

Although a verified bill of particulars does not in every respect meet the requirements of this section, yet, in the absence of timely objection it may be treated as sufficient if it serves the purpose of the case. *Sitzer v. Fenzloff*, 112-491.

**SEC. 3627. Action in representative capacity.**

[For earlier annotations, see code, page 1389.—Ed.]

In filing a claim against an estate it is not necessary to specify in what capacity the claim is made, and denial of the capacity of plaintiff to sue must be made specific. *University of Chicago v. Emmert*, 108-500.

While a failure to allege corporate capacity is a ground of demurrer, such objection comes too late after judgment. *Calnan Const. Co. v. Brown*, 110-37.

**SEC. 3628. Denial—facts must be stated.**

[For earlier annotations, see code, pages 1389-90.—Ed.]

Where the petition in an action on a policy of insurance states that plaintiff has performed every act necessary to comply with the terms of the policy, defendant cannot rely upon failure to submit to an appraiser without pleading such fact as a defense. *Smith v. Continental Ins. Co.*, 108-382.

Where plaintiff alleges its corporate capacity, and the denial is merely want of information on the subject, this is not sufficient to put in issue the corporate capacity of the plaintiff. *Iowa Sav. & L. Assn. v. Selby*, 111-402.

Where corporate existence is a material allegation of fact, proof of which is necessary to sustain plaintiff's claim, the case is not governed by this section. *Taft Co. v. Bounina*, 110-739.

To put in issue defendant's corporate capacity as alleged in the petition, facts showing want of such capacity must be specially pleaded. *Stork v. Supreme Lodge K. of P.*, 113-724.

**SEC. 3629. Matters specifically pleaded.**

[For earlier annotations, see code, pages 1390-1.—Ed.]

In an action for criminal conversation, defendant, desiring to prove the acquiescence of the husband in the relations to his wife, should set up the facts by way of special defense. If he does not do so, he cannot prove them under general denial. *Morning v. Long*, 109-288.

The defense of the statute of limitations is waived if not pleaded. *McDonald v. Bice*, 113-44.

Section applied. *Shawyer v. Chamberlain*, 113-742.

**SEC. 3630. Motion for more specific statement.**

[For earlier annotations, see code, pages 1391-2.—Ed.]

A motion to strike out defensive matter from an answer on the ground that it is immaterial and redundant cannot be sup-

ported by affidavit. *Mast v. Wells*, 110-128.

In an action against two defendants to recover compensation for keeping, caring for and feeding stock, at the request of the defendants, orally made, held that it was error to overrule a motion asking that plaintiff be required to state whose property it was he kept, cared for and fed, and at whose instance and for whose benefit he performed the labor specified. *Hurd v. Ladner*, 110-263.

### SEC. 3639. Amount of proof.

[For earlier annotations, see code, page 1393.—Ed.]

Unnecessary averments in a pleading need not be proven. *Kerr v. Topping*, 109-150.

A party is not required to prove all that

### SEC. 3640. Denial of genuineness of signature.

[For earlier annotations, see code, pages 1398-5.—Ed.]

Having once denied the signature under oath, defendant is not bound to renew his denial in subsequent amendments. *Renner v. Thornburg*, 111-515.

Such denial throws the burden of proof on the opposite party. *Ibid.*

In an action on a note purporting to be signed by a corporation the corporation may deny the genuineness of its signature by alleging that its president who signed the corporate name had no authority to do so. The verification of such sworn denial by a proper officer of the corporation is sufficient to put in issue the genuineness of the corporate signature. *Mar-*

Where defendant in his answer denies, either generally or specifically, the allegations of plaintiff's petition, he cannot be required by motion for more specific statement to make such denials more particular. *Provident Bank Stock Co. v. Shafer*, 110-440.

Section applied as to stating whether contract is in writing. *Montgomery v. Downey*, 88 N. W., 810.

he alleges. It is enough that he show sufficient facts entitling him to recover. *Krejci v. Chicago & N. W. R. Co.*, 90 N. W., 708.

*shall Field Co. v. Oren Ruffcorn Co.*, 90 N. W., 618.

Section applied. *Carthage Nat. Bank v. Butterbaugh*, 88 N. W., 954.

[The Code note for the case of *Schulte v. Coulthurst*, near the bottom of second column on page 1394, should be changed to read as follows.]

Where a claim against an estate is based upon a note, a denial of the execution of the note puts in issue the genuineness of the signature and overcomes the presumption which ordinarily obtains in favor of the signature of a written instrument when the statutory denial is not made. *Schulte v. Coulthurst*, 94-418.

### SEC. 3641. Supplemental pleading.

[For earlier annotations, see code, page 1395.—Ed.]

A continuance of the same grievance complained of in the original petition may be pleaded by way of supplemental petition for the purpose of securing additional relief. *Foot v. Burlington Gas Light Co.*, 103-576.

The true criterion for determining the propriety of a supplemental petition does not lie in ascertaining whether it states a cause of action which might be independently maintained. It may be read with the original petition and both considered as one pleading, and if its scope is limited to strengthening, developing or re-enforcing the original cause of action, or of enlarging the extent of, or changing the relief sought, then it meets the very purpose of such a pleading. The new cause

of action which the law will not permit to be thus pleaded is one not related to that stated in the original petition and which, under the rules of pleading, must be set up in a separate count or division. *Ibid.*

Therefore, held, in an action to recover damages resulting from the maintenance of a nuisance, a claim for additional damages accruing since the commencement of the action by reason of a continuance of the nuisance might be set up in a supplemental petition. *Ibid.*

This section does not authorize the presentation of an entirely new cause of action. *Allen v. Davenport*, 87 N. W., 743.

Section applied. *Christie v. Iowa Life Ins. Co.*, 111-177.

### SEC. 3642. Matter in abatement.

[For earlier annotations, see code, page 1396.—Ed.]

Where a prior action is so dismissed by the plaintiff as to waive any right to recover therein such prior action cannot be relied on in abatement of a subsequent action. *Pray v. Life Indem. & Secur. Co.*, 104-414.

This section does not specify what shall be a good plea in abatement. That must be determined independently of the statute. *Mofft v. Chicago Chronicle Co.*, 107-407.

An affirmative defense in the nature of

a plea in abatement is denied by operation of law. *State v. Beardsley*, 108-396.

One of the recognized tests of determining whether the plea of another action pending is good lies in ascertaining whether the judgment, when obtained, would necessarily be *res adjudicata* of the issues of the action wherein the plea is interposed. *Valley Bank v. Shenandoah Nat. Bank*, 109-43.

The fact that the action depends upon the same right or title as another action pending will not suffice to sustain a plea in abatement. The two actions must involve the same cause of action. *Watson v. Richardson*, 110-698.

Two actions for the same cause may not be maintained at the same time because

the second suit is unnecessary for the enforcement of rights or the redress of wrongs, and simply annoys and harasses the defendant without cause, but the reason of the rule applies only when the plaintiff in both actions is the same person, and hence the rule itself falls when this is not true. The fact that the parties do not stand in the same relation in the two suits is an insuperable obstacle to the plea. *Oratt v. Howard*, 109-504.

The rule that the court first acquiring jurisdiction of the case will retain the same to the exclusion of any other court of concurrent jurisdiction is not applicable unless it appears that the suits are between the same parties seeking the same remedy. *State v. Clough*, 112-714.

### SEC. 3644. Consolidation of actions.

[For earlier annotations, see code, page 1397.—Ed.]

Two actions, one in law and the other in equity, although between the same parties, should not be consolidated. *Hodowal v. Yearous*, 103-32.

Where so far as the parties defendant are actually served with notice the actions may properly be consolidated, such consolidation will not be erroneous on account of the fact that other parties defendant are named in the two actions, who if they had been properly brought into court would have prevented the consolidation. *Bank of Montreal v. Ingerson*, 105-349.

The important inquiry as to the consolidation of actions in equity is as to the

identity of the subject matter involved. The aim is to bring in all the parties in interest, and suits will be consolidated without special regard to the identity of parties. This is because of the power of such a court to make proper orders, according to each party exact justice. *Cox Shoe Co. v. Adams*, 106-402.

Consolidation is effected on the order of court alone, upon application of a party, or by motion. When applied for the order is discretionary, and the action of the trial court in the matter will be interfered with only on a clear showing of abuse. *Jones v. Witousek*, 114-14.

## CHAPTER 9.

### OF TRIAL AND JUDGMENT.

#### SECTION 3650. How issues tried.

[For earlier annotations, see code, page 1398.—Ed.]

There is not in general a right to a jury trial in special proceedings. *Green v. Smith*, 111-183.

Where there is no element of accounting or other recognized ground of equitable jurisdiction, mere intricacy of the calculations necessary to determine the amount of plaintiff's recovery will not justify the court in refusing to grant a

jury trial in an action at law. *Galusha v. Wendt*, 114-597.

The issues on an appeal under Code § 2450 as to the correctness of the action of the board of supervisors in canvassing a statement of consent under the mulct law are triable without a jury, and it is error to submit issues in such a proceeding to a jury, even in an advisory way. *Porter v. Butterfield*, 89 N. W., 199.

#### SEC. 3651. Method of trial in ordinary actions.

[For earlier annotations, see code, page 1399.—Ed.]

A proceeding for admeasurement of dower is triable ordinarily upon assign-

ment of error and not *de novo*. *In re Estate of Lund*, 107-264.

#### SEC. 3652. In equitable actions—certificate of evidence—trial anew on appeal.

[For earlier annotations, see code, pages 1399-1405.—Ed.]

Evidence taken down. Under the statutory provision that in equity cases

the evidence shall be taken down in writing and all the evidence so taken shall be

certified by the judge and be made a part of the record and go on appeal to the supreme court, the transcript of the evidence taken in shorthand and certified by the reporter and filed, is to be deemed written evidence. But otherwise the trial judge must finally determine what the evidence is in a case tried before him and the certificate of the judge to the shorthand notes is conclusive that they contain the evidence on the trial. It is immaterial whether the reporter certifies to the correctness of such notes or his transcript thereof. *Dietz v. Capital City Brick & Pipe Co.*, 103-542.

The provisions of Code of '73, § 2742, as amended, that the written evidence should be certified within the time allowed for appeal, was not affected by the provision of 26 G. A., ch. 64, by which the transcript of the shorthand reporter's notes might be transmitted to the supreme court in lieu of the clerk's transcript of such evidence. *Sloan v. Davis*, 105-97.

The notes of the stenographer are not evidence in writing within the statutory provision as to taking down the evidence in writing in an equity case. But when such notes identifying all documentary evidence are duly certified to by the trial judge the transcript thereof, including the judge's certificate, duly certified by the reporter, may become written evidence. To secure a trial *de novo*, however, a transcript of the evidence must be on file within six months from the time final decree is entered. *Smith v. Wellslager*, 105-140.

According to the law as it now stands equity actions are to be tried on written evidence and no motion for that purpose is required. To make the transcript when duly certified a part of the record for the purpose of appeal it is necessary to file it with the clerk within six months from the time final decree was entered, and evidence not thus preserved can not be considered on appeal, even on assignment of errors. *Ibid.*

Under § 2742 of the Code of '73 held that the court might in its discretion refuse to order the testimony to be taken by depositions. But held that such refusal even though erroneous would not constitute prejudicial error as the party would have had a right to introduce the evidence by depositions so far as he desired. *Varnum v. Winslow*, 106-287.

**Certificate of judge and reporter.** To justify a trial anew of an equity case in the supreme court the evidence must be certified and filed within the time allowed for appeal, that is, six months. *Bauernfiend v. Jonas*, 104-57.

Failure to file the certificate in time can not be cured by an order *nunc pro tunc*. *First Nat. Bank v. Redhead*, 103-421.

Where the evidence is not thus preserved the court cannot, on assignment of error, pass upon questions in the case requiring

the consideration of the evidence. *Smith v. Wellslager*, 105-140.

The office of the certificate of the judge is to identify the evidence and to make it of record when filed, while it is the office of the certificate of the clerk to identify and authenticate the record. *Bauernfiend v. Jonas*, 104-57.

Where the judge certified that the evidence was all the evidence offered, given or introduced upon the trial, held, that such certificate was sufficient. *Miller Brewing Co. v. Hansen*, 104-307.

A certificate that the record contains all the evidence offered and introduced on the trial is not sufficient to enable the court to try the case *de novo*. *Cheney v. McCulloch*, 104-249.

A certificate that the transcript of the evidence is a correct, true and complete transcript of all the evidence introduced, both oral and documentary, together with the objections interposed by counsel and the rulings of the court thereon, exceptions taken, etc., is not sufficient to enable the court to try the case *de novo*, because it does not show that the record contains all of the evidence which was offered upon the trial below. *Greenlee v. Home Ins. Co.*, 103-484.

Where exhibits used on the trial below are not incorporated into the record, and the reporter does not certify that the record contains all the evidence, the case cannot be tried *de novo*. *Star Mfg. Co. v. Gibson*, 74 N. W., 927.

Exhibits which are sufficiently identified in the stenographer's report or translation, duly certified by the judge, are sufficiently preserved. *Mason v. Des Moines*, 108-658.

Under the provisions of Code § 4118, embodied in Rule 22 of the supreme court, it is not necessary to formally allege in the abstract on appeal that the evidence was certified by the trial judge and the certificate made of record. *Kirchman v. Standard Coal Co.*, 112-668.

To secure a trial *de novo* the provisions of this section must be complied with. Code § 3675 as to reporting the proceedings in general does not relate to the subject. *Dwyer v. Rock*, 87 N. W., 495.

It is not required that the evidence in equity cases be taken down by the official reporter, and the certificate of the transcript should be made by the reporter who reports the proceedings. *Spinney v. Halliday*, 88 N. W., 939.

Where appellee has set out in an additional abstract portions of the evidence, which he avers to be a part of the record, he cannot raise the question whether the evidence was properly preserved in an equity case. *Sarvis v. Caster*, 89 N. W., 84.

After the evidence has on appeal been stricken from the record because not properly preserved and the case has been submitted on the part of appellee, appellant

is not entitled to have the evidence reinstated and the case considered as though such evidence was in the record. *Citizens Bank v. Johnson*, 107-365.

**Assignments of error.** Where appellant is entitled to a trial *de novo*, assignments of error relating to rulings on the introduction of evidence will not be considered. *Foy v. Armstrong*, 113-629.

In a case triable *de novo* the appellant cannot make assignments of error in the admission or rejection of evidence, and

have them considered as at law. *Spinney v. Halliday*, 88 N. W., 939.

In an equity case rulings on motions to strike and on demurrers will not be considered unless exception is taken and error assigned. *Hogueland v. Arts*, 113-634; *Jackson v. Seevers*, 88 N. W., 932.

On a trial *de novo* the supreme court does not consider points of practice, unless they are in some manner brought to the attention of the trial court and exception taken to the ruling thereon. *West Side Lumber Co. v. Hathaway*, 89 N. W., 35.

### SEC. 3653. Abstracts in equity causes.

The costs of this abstract are not to be taxed to the unsuccessful party. *Grapes v. Grapes*, 106-316.

### SEC. 3654. Finding of facts.

[For earlier annotations, see code, pages 1406-7.—Ed.]

A finding of facts by the court in a law case tried without a jury should not be disturbed unless so clearly against the evi-

dence as to justify the conclusion that it was based on passion or prejudice. *Brown v. Curtis*, 111-542.

### SEC. 3655. Trial term.

Parties may consent to trial at the term at which the petition is filed, although proper notice of the filing of the petition

has not been given. *Rummel v. Dealy*, 112-503.

### SEC. 3658. Trial notice.

[For earlier annotations, see code, page 1408.—Ed.]

The provisions as to trial notice do not apply to motions. *Manning v. Nelson*, 107-34.

### SEC. 3659. Assignments of trial causes—hearing of motions and demurrers.

[For earlier annotations, see code, page 1408.—Ed.]

The rules made by the judges of court in force prior to the adoption of the present Code did not require the court to make assignments of cases for trial and it was

not error for the court on request of a party to refuse to make such an assignment. *Slocum v. Brown*, 105-209.

### SEC. 3660. Docketing appeals from justices—other appeals.

It is evident from this section that an affirmative duty is placed on the appellant to get an appeal from the action of the board of tax reviewers before the district

court for determination. Notice of an appeal is not alone sufficient. *Frost v. Board of Review*, 114-103. See also Code § 4559.

### SEC. 3663. Causes for continuance.

[For earlier annotations, see code, pages 1409-11.—Ed.]

The filing of an amendment or of a supplemental petition will not alone authorize a continuance and if the defendant desires a continuance on that ground he must set out some good reason therefor. *Foot v. Burlington Gas Light Co.*, 103-576.

Inability to secure the attendance of a witness is not a sufficient ground for a continuance where the party has not used reasonable diligence in attempting to secure the attendance of such witness. *Moffit v. Chicago Chronicle Co.*, 107-407.

The matter of granting a continuance is largely within the discretion of the trial court and to justify a reversal it must clearly appear that this discretion has been abused and that an injustice has been done thereby. *Cheney v. McColloch*, 104-249; *Hibbets v. Hibbets*, 90 N. W., 613.

The grounds alleged in a motion for continuance in a particular case held not sufficient to require a reversal of the action of the trial court in overruling the motion. *Hibbets v. Hibbets*, 90 N. W., 613.

**SEC. 3664. Affidavits—what must show.**

[For earlier annotations, see code, pages 1411-12.—Ed.]

The affidavit must not only show diligence in attempting to secure the presence of the witness, and the materiality of the evidence sought to be obtained, but also that the witness' presence can be secured by ordinary methods at the ensuing term, and where it appeared that the witness in question had once disobeyed a subpoena, and there was no reason to think that he would come at any other time without com-

pulsion, and also that he was a non-resident of the state, held that the showing was not sufficient. *State v. McGinn*, 109-641.

The showing in a motion for a continuance as to the absence of witnesses held not sufficient as to what it was proposed to prove by such witnesses. *State v. Penney*, 113-691.

**SEC. 3675. Report of trial—certificate.**

[For earlier annotations, see code, pages 1414-15.—Ed.]

Where the trial judge attached to the shorthand notes a certificate to the effect that such notes were the official report of the case and that they contained, together with the documentary evidence therein referred to, all of the evidence that was offered or introduced on the trial of said case, and all objections and rulings made and exceptions taken, and made said official report in shorthand a part of the record, held, that proceedings with reference to the separation of the jury which were found in the shorthand notes were thereby made a part of the record and might be considered on appeal. *State v. Smith*, 102-656.

Prior to the adoption of this section no certificate of the reporter was necessary to enable his notes to be incorporated by reference into a skeleton bill of exceptions. *Sigler v. Murphy*, 107-128.

The bill of exceptions need only contain such matter as will enable the court to pass on the errors assigned, and this rule is not changed by the provisions of this section by which the notes of the shorthand reporter become a substitute for the bill of exceptions. The section provides for the preparation of a full and complete bill. A partial bill may be prepared in the same manner, and if errors assigned are based entirely on rulings on the admissibility of evidence, or its effect, it is sufficient if the evidence offered and received, together with the objections, rulings and exceptions are duly certified and filed, as therein directed. If the proceedings are in fact taken down in shorthand, and duly certified, they become a bill of exceptions, regardless of any preliminary order. *State v. Welsh*, 109-19.

Where appellant denies that the evidence was properly preserved and made of record by extension of the shorthand notes into longhand, and the filing of the transcript, appellee must furnish a transcript from the clerk establishing the fact; otherwise the court cannot, on appeal, consider any question depending on the evidence. *State v. Owens*, 109-143.

Where the notes in shorthand were duly

certified by the trial judge, but the reporter, after extending them, instead of copying the judge's certificate, detached it from the notes and attached it as a part of his own at the end of the transcript, held that the transcript as so prepared and certified should be treated as the evidence in the case. *Steele v. Pothast*, 109-413.

By Code § 3707 exceptions to instructions may be noted by the shorthand reporter without reason therefor being given. *White v. Elgin Creamery Co.*, 108-522.

The entry by a reporter in his minutes of the fact of the return of the verdict does not constitute a record of the receipt of the verdict with the court so as to preclude the court from sending the jury out to correct the verdict which has been offered. *State v. Novak*, 109-717.

This section of the Code works little change in the law as it formerly stood, beyond enlarging what shall be included in the report and making it mandatory upon the demand of either party. *In re Tobey's Estate*, 112-581.

The provisions of this section do not modify the requirements of Code § 3652 as to what is required in order to secure a trial *de novo* in an equity case. *Dwyer v. Rock*, 87 N. W., 495; *Spinney v. Halliday*, 88 N. W., 939.

The transcript of the shorthand notes should be certified by the person who as reporter takes down the proceedings. It is not necessary that this be the official reporter, and, where the proceedings were reported by an assistant of the official reporter, held that the certificate of the official reporter to the transcript was not sufficient. *Spinney v. Halliday*, 88 N. W., 939.

Although the stenographer who reports the case is not the official reporter, and is not sworn, nevertheless, if the judge appends the proper certificate to the transcript of the testimony, this is enough to preserve the evidence. *Meader v. Allen*, 110-588.

**SEC. 3680. Challenges to panel—when and how made.**

Objection to the method of drawing talesmen should be interposed before the jury is selected. *State v. Minor*, 106-642.

**SEC. 3684. When made—determination.**

[For earlier annotations, see code, page 1416.—Ed.]

A party who accepts the jury and goes to trial without objection cannot afterwards be heard to complain either of the character of the jury or of the time of the trial. *Frank v. Davenport*, 105-588.

**SEC. 3688. Challenges for cause.**

[For earlier annotations, see code, pages 1417-18.—Ed.]

Error in overruling a challenge for cause will not be deemed prejudicial where it does not appear in the record that the juror could not have been dismissed peremptorily. *Haggard v. Andrew*, 107-417.

The general statement that the party challenges a juror for cause is too indefinite. *Ibid.*

To take advantage of the disqualification

of a juror after verdict, it is incumbent on the party complaining to show affirmatively that neither he nor his counsel had knowledge thereof before the juror was sworn. *State v. Bussamus*, 108-11; *State v. Moats*, 108-13.

The determination of the competency of a juror is largely within the discretion of the trial judge. *In re Goldthorp's Estate*, 88 N. W., 944.

**SEC. 3700. Procedure after jury is sworn—order of evidence.**

[For earlier annotations, see code, pages 1419-22.—Ed.]

The question as to who has the right to open and close is properly a matter of practice, and will not be reviewed unless it appears that an injustice has been done

by the trial court in its ruling on the matter. *Oxtoby v. Henley*, 112-697.

The defendant introducing an affirmative defense has the burden of establishing it. *Ibid.*

**SEC. 3701. Argument—opening and closing.**

[For earlier annotations, see code, pages 1422-3.—Ed.]

Under the language of this section, differing from that of the corresponding section of the Code of '73, the right to open and close is to be determined after the introduction of the evidence. *Schoonover v. Osborne*, 90 N. W., 844.

The absence of the judge from the court room beyond the hearing of the proceedings, even during the arguments in the

case, when not shown affirmatively to have been without prejudice, is in itself error alone sufficient to warrant a reversal of the judgment. *State v. Carnagy*, 106-483.

But objection on this ground may be waived by consent in advance, even in a criminal case. *State v. Hammer*, 89 N. W., 1083. See also notes to Code § 3755 in this supplement.

**SEC. 3705. Instructions—to be in writing.**

[For earlier annotations, see code, pages 1423-39.—Ed.]

**In writing.** A direction to the jury not to consider certain evidence except for a specific purpose need not be in writing. *State v. Hogan*, 88 N. W., 1074.

What the court says by way of ruling on an objection need not be reduced to writing. *Frick v. Kabaker*, 90 N. W., 498.

**Withdrawal.** Where after the case was submitted to the jury by the judge who tried it, he ceased to hold the term of court, and turned the business of the court over to another judge of the same district, and at the time of doing so directed the succeeding judge to withdraw from the jury certain instructions which he had concluded were erroneous, and the second judge did so, held that the proceeding did not constitute error requiring a reversal. *Renner v. Thornburg*, 111-515.

**Instructions should be asked.** Error in an instruction given may be ground for reversal, even though the appellant has not asked an instruction on the subject in proper form. It is only where the instruction given is complained of as not being sufficiently specific that the party complaining must show that more specific instructions were asked by him. *State v. Goring*, 106-636.

Where the instructions are good as far as they go, it is not error to fail to instruct on other matters as to which no instructions are asked. *Keyes v. Cedar Falls*, 107-509.

Where the instruction is correct as given, though not as explicit as might be desired, error cannot be predicated thereon in the

absence of a request for more specific instructions. *State v. House*, 108-68.

In the absence of a request, failure to give instructions relating to burden of proof is not erroneous. *Harvey v. Clarinda*, 111-528.

A party does not waive objection to insufficiency of the evidence to sustain an issue by asking an instruction relating to that issue. *Boyer v. Commercial Bldg. Inv. Co.*, 110-491.

**Refusal of proper instructions.** It is error to refuse a correct instruction as to a material matter not covered by the instructions given. *Botwin v. Cassidy*, 106-334.

**Error of which party cannot complain.** A party cannot complain of an instruction given which in substance and effect follows an instruction asked by him, even though erroneous. *Bonnot Co. v. Newman*, 109-580.

**General directions.** An instruction directing the jury in their deliberations not to refer to, discuss or consider anything in connection with the case except the evidence received, and to exclude all extraneous matters, statements and suggestions, is proper. *State v. Butts*, 107-653.

**Duty to state the issues.** While the issues in the case should be clearly defined by the court, it is not necessary that they be grouped and stated in separate paragraphs of the charge devoted to that purpose alone. It is enough if the instructions as a whole point out the entire issues of the case. *Meyer v. Boepple Button Co.*, 112-51.

**Reference to pleadings.** The court should determine, from an examination of the pleadings, what the issues are, and so state them to the jury as to be readily comprehended. The setting out the pleadings in lieu of such statement will not be tolerated unless manifestly without prejudice. *Swanson v. Allen*, 108-419.

While it has been held erroneous to refer the jury to the pleadings for the issues, it has never been held that the trial court might not set forth the issues in the manner in which they are stated in the pleadings. *Ft. Madison v. Moore*, 109-476.

It is erroneous to copy into the instructions at length the pleadings in the case when they present issues which it is not proper to submit to the jury. In such case the court should state in its own language the real issues which are submitted to the jury. *West v. Averill Groc. Co.*, 109-488.

Where the court failed in stating the issues to mention some of the grounds of negligence alleged and relied on by plaintiff, held that there was error which was not cured by reference to the particulars of negligence charged in the petition. *Hart v. Cedar Rapids & M. C. R. Co.*, 109-631.

It is not proper for the court, in stating

the issues, to use copies of the pleadings and read them *in haec verba* to the jury, but a party who has consented to such a course of proceeding cannot be heard to complain thereof. *De Wulf v. Dix*, 110-553.

Where the petition was very short and simple, and charged the negligence for which the plaintiff sought to recover in such unambiguous language that the court could not well make the cause of action more intelligible or shorter by an independent statement, held that it was not error to recite the pleading in the instructions. *Graybill v. Chicago, M. & St. P. R. Co.*, 112-738.

An instruction in a particular case, which, while not a copy of the pleadings substantially followed the pleadings without pointing out definitely the questions to be determined by the jury, held erroneous. *Erb v. German-American Ins. Co.*, 112-357.

Even when the parties consent that the court may refer the jury to the pleadings for the statement of the issues in a case, it is of doubtful propriety for the court to compel the jury to search out and determine the issue they are to decide. *Trumble v. Happy*, 114-624.

The court should state the issues to the jury without copying the pleadings in full, but as a rule the supreme court will not reverse for such improper practice, if in other parts of the charge the real issues are distinctly stated so that no prejudice has resulted. *Welch v. Union Cent. L. Ins. Co.*, 90 N. W., 823.

**Issues not presented.** It is error to instruct on issues not presented by the pleadings even though evidence has been introduced without objection which presents other issues. *Eller v. Loomis*, 106-276.

It is erroneous to instruct on an issue not raised by the pleadings, and on which no evidence has been introduced. *Duncan v. Gray*, 108-599; *Blackman v. Kessler*, 110-140; *Anderson v. Jacobs*, 112-749.

It is improper to submit to the jury in an action for personal injuries resulting from negligence, charges of negligence which are not made in the pleadings. *Beard v. Guilt*, 107-476.

It is error to instruct with reference to an issue not raised by the pleadings. Therefore, held that where plaintiff sued a railroad company for injury caused to him as a passenger by defendant's negligence, it was error to submit the question whether he could recover against the railroad company as a trespasser for gross negligence. *Fitzgibbon v. Chicago & N. W. R. Co.*, 108-614.

When an issue is clearly recognized by a party as being involved in the trial, and he not only makes no objection thereto, but affirmatively consents, or requests that it be passed upon, he cannot be heard after-

ward to complain of the action of the court in submitting such issue to the jury. *Fenner v. Crips*, 109-455.

A party cannot complain of the action of the court in submitting to the jury an issue on which such party has himself asked instructions. *Benton County Sav. Bank v. Boddicker*, 90 N. W., 822.

**Instructions not supported by evidence.** It is error to submit to the jury a material issue of fact concerning which there is no evidence. *Podhaisky v. Cedar Rapids*, 106-543; *State v. Swallum*, 111-37; *Olmstead v. Foy*, 112-349; *Erb v. German-American Ins. Co.*, 112-357; *Anderson v. Jacobs*, 112-749.

In an action to recover damages for personal injuries, it is error to direct the jury that they may allow damages for nursing where no evidence of the expense of nursing has been introduced. *Lamb v. Cedar Rapids*, 108-629.

Where under the evidence the plaintiff is entitled to recover on only one of two grounds of action set up in his petition, it is error in stating the issues to a jury to recognize the other ground of recovery. *Tuffree v. Steward*, 109-600.

Where by agreement of parties instructions were orally given, held, that it was not error to read the answer in the case, although it was claimed that there was no evidence in support thereof, it appearing that the court later in the charge called attention specially to the issues which had support in the testimony. *Frank v. Davenport*, 105-588.

**As to questions of fact.** It is erroneous to single out a portion of the evidence relied upon by plaintiff and say that such evidence will not justify a recovery. *Crowell v. McGoon*, 106-266.

Where there is a conflict in the evidence it is erroneous for the court to instruct the jury as to the facts. *Eller v. Loomis*, 106-276.

An instruction which does not assume anything as to the disputed facts but simply directs the jury as to the effect of certain facts if found, is not objectionable as an instruction upon the facts. *Owen v. Christensen*, 106-394.

It is not error to say to the jury that "evidence has been introduced tending to show" certain facts as to which there has in fact been some evidence introduced. *State v. Baughman*, 111-71.

It is not prejudicial error for the court to assume a fact about which there is no dispute. *State v. Cunningham*, 111-233.

**Construction of instruments.** It is for the court to give the jury the meaning of a written contract upon the various hypotheses presented by the evidence. *Clement v. Drybread*, 108-701.

In an action for malicious prosecution it is error to leave it to the jury to determine from the pleadings in the former case what was alleged therein as the complaint

against the defendant in that case. *Erb v. German-American Ins. Co.*, 112-357.

Where the terms used in a contract are plain and unambiguous, omission to define such terms, in the absence of proper request, is not error. *Ware Cattle Co. v. Anderson*, 107-231.

**Construed together.** Words in instructions are not to be considered with reference to their technical accuracy, but relatively, and that meaning is to be credited to them which such a consideration shows to have been intended. *In re Allison's Estate*, 104-130.

No one instruction may contain all the law applicable to the entire case, and for this reason all should be considered together in passing upon the issues, but this does not obviate the rule that one instruction may contain the law as applied to some hypothesis or given state of facts. *Swanson v. Allen*, 108-419.

**Conflicting.** Contradictory and conflicting instructions are almost uniformly held to be erroneous, except in cases where the court can say there was no prejudice. *Ford v. Chicago, R. I. & P. R.*, 106-85.

It is error to give instructions which are in conflict. *Gibson v. Burlington, C. R. & N. R. Co.*, 107-596; *Loomis v. Des Moines News Co.*, 110-515.

Although the law on a particular question is correctly stated in one instruction, yet, if in another instruction the direction as to whether the jury shall find a verdict is made to depend on facts which do not include nor relate to such question, the instructions are in conflict and erroneous. *Quinn v. Chicago, R. I. & P. R. Co.*, 107-710.

In such case the latter instruction would tend, by giving undue prominence to one question, to withdraw the attention of the jury from the other question, and to nullify the effect of the former instruction. *Ibid.*

When conflicting instructions are given, one of which announces a correct, and the other an incorrect rule, the case must be reversed, for there is no means of knowing which one the jury followed. *Kerr v. Topping*, 109-150.

**Misleading.** An instruction in an action to recover for personal injuries on account of negligence which makes the right to recover depend upon a collateral fact, omitting the necessary element of negligence on the part of defendant, and the want of contributory negligence on the part of plaintiff, is erroneous. *Meyer v. Boepple Button Co.*, 112-51.

Where instructions are in conflict or misleading the judgment will be reversed, even though the objection is based on a clerical error in one of the instructions. *Rich v. Moore*, 114-80.

In a particular case held that an instruction relating to fraud should not have been confused by introducing into it reference

to want of consideration. *Frick v. Kabaker*, 90 N. W., 498.

**Curing error.** Error in the admission of evidence may be cured by an instruction explicitly advising the jury not to consider such evidence. *Keyes v. Cedar Falls*, 107-509.

In a particular case held that an instruction not to consider certain evidence was sufficient to remove any errors committed in the receipt of such evidence. *State v. Booth*, 88 N. W., 344.

Error of the court in refusing to take from the jury in a prosecution for murder the charge of murder in the first degree held to be cured by an instruction that the evidence was not sufficient to support a conviction of murder in that degree. *State v. Phillips*, 89 N. W., 1092.

**Misconduct of counsel.** Improper argument of counsel may be so far prejudicial that the prejudice therefrom cannot be removed by an instruction directing the jury not to consider the matter referred to. *State v. Hogan*, 88 N. W., 1074.

### SEC. 3707. Record—exceptions.

[For earlier annotations, see code, pages 1440-2.—Ed.]

An exception taken at the time to the giving of all the instructions given is sufficiently specific. *First Nat. Bank v. Robinson*, 105-463.

This section expressly provides that exceptions to instructions may be noted by the shorthand reporter without reason for such exception being given. *White v. Elgin Creamery Co.*, 108-522.

An entry on the margin of an instruction, "Given, plaintiff excepts," signed by the judge, is sufficient when the exception is taken at the time that the instruction is given. *Clement v. Drybread*, 108-701.

Section applied. *Decatur v. Simpson*, 88 N. W., 839.

### SEC. 3708. Numbered—given or refused.

[For earlier annotations, see code, page 1442.—Ed.]

Where the omission to number paragraphs of the instructions does not appear to have worked to the prejudice of the unsuccessful party, it will not be a ground for reversal on appeal. *Johnson v. Sioux City*, 114-137.

The fact that the court fails to number the paragraphs of instructions is not ground for new trial. *In re Evans' Estate*, 114-240.

The provision for marking instructions as "given" is directory, and a failure to so mark them will not constitute error. *Turley v. Griffin*, 106-161.

The instructions are sufficiently identified in a skeleton bill of exceptions by referring to them as filed in a case by their numbers and as duly indorsed by the presiding judge. *Manatt v. Scott*, 106-203.

### SEC. 3709. Exceptions after verdict.

[For earlier annotations, see code, pages 1442-3.—Ed.]

Exceptions taken to instructions in a motion for a new trial must point out the defects complained of. *State v. Williams*, 88 N. W., 194.

Exceptions to instructions in a particular case taken in writing, but not at the time the instructions were read, held, not sufficiently specific. *Lacy v. Kossuth County*, 106-16.

Where by agreement of the parties leave is granted for delay in filing a motion for a new trial, it does not authorize the incorporation in such motion of exceptions to the instructions which were not taken at the proper time. *Turley v. Griffin*, 106-161.

The fact that exceptions taken to the

instructions in a motion for a new trial are not sufficiently specific will not defeat a consideration of exceptions properly taken at the time the charge is given. *State v. Smith*, 107-487.

A general assertion in a motion for a new trial that "the court having erred in determining the effect of the written lease should correct the error by setting aside the verdict," held not a sufficient exception to instructions. *American Sav. Bank v. Shaver Carriage Co.*, 111-137.

The exception in a motion for a new trial that the court erred in giving certain instructions, which are specified, but the objection to which is not pointed out, is not sufficient. *Rule v. McGregor*, 88 N. W., 814.

### SEC. 3710. View of premises by jury.

[For earlier annotations, see code, pages 1443-4.—Ed.]

It is error to allow a map not introduced in evidence to go to the jury at their re-

quest to be used by them in construing the evidence. *De Wulf v. Dix*, 110-553.

**SEC. 3719. Further testimony to correct mistake.**

[For earlier annotations, see code, pages 1446-7.—Ed.]

Where it does not appear that the omission of evidence occurred from oversight, the action of the court in refusing to allow the introduction of further evidence will not be overruled on appeal. *Banning v. Purinton*, 105-642.

It is not error after the closing of the case to permit the introduction of evidence which is necessary in order to secure a decision on the merits and deprive the opposite party of a technical advantage

acquired by evident oversight of his adversary. *Independent School Dist. v. Hewitt*, 105-663.

Where the judge indicated his intention to rule against a party on the ground that there was no evidence of a material fact, held error to refuse to receive additional evidence of witnesses then present in court to prove such fact. *Cathcart v. Rogers*, 87 N. W., 738.

**SEC. 3720. Additional instructions.**

[For earlier annotations, see code, page 1447.—Ed.]

Held not error, after the jury had been out deliberating for more than thirty-six hours, to give an instruction to the effect that the case must be determined by some jury, that it must be determined on the same pleadings and evidence, that a dis-

agreement would simply add to the burden of the unsuccessful party, and that it should again retire for deliberation and try and arrive at a verdict. *Delmonico Hotel Co. v. Smith*, 112-659.

**SEC. 3722. Verdict—how signed and rendered.**

[For earlier annotations, see code, pages 1448-52.—Ed.]

**Directing verdict.** Where there is a total failure of proof as to a claim made in the petition the court should, on the request of defendant, direct a verdict for him at the close of plaintiff's evidence. *Saatoff v. Scott*, 103-201.

Where each party moves for a verdict at the conclusion of the evidence and there is not sufficient evidence to justify the court in directing a verdict for the party in whose favor judgment is entered, the case will be reversed on appeal. As to whether the party securing judgment in such case has thereby waived the right of submission of the case to a jury, *quaere*. *First Nat. Bank v. Mt. Pleasant Milling Co.*, 103-518.

In an action to recover the statutory penalty for selling intoxicating liquor to a minor, the sale being conceded and the undisputed testimony being that the person to whom the sale was made was in fact a minor, held, that a verdict for the plaintiff might be directed by the court. *Fielding v. La Grange*, 104-530.

In applying the rule as to taking the case from the jury and directing a verdict, the trial court cannot pass upon the question as to whether or not the preponderating weight of the evidence is in favor of or against a party, nor upon the weight of the evidence or the credibility of the witnesses; all these matters are for the consideration of the jury. *McLeod v. Chicago & N. W. R. Co.*, 104-139.

To sustain a ruling of the trial court in directing a verdict, the facts essential to show a valid cause of action must be so apparent from the evidence that reason-

able men could not differ as to the facts which it establishes. *Morey v. Laird*, 108-670.

The fact that each party asks the court to direct the verdict in his favor does not constitute a waiver by either of the right to have the case submitted to the jury in the event that his motion is not sustained. *German Sav. Bank v. Bates Imp. Co.*, 111-432.

The court cannot on a motion to direct a verdict determine as to the weight of the evidence, nor pass upon the credibility of the witnesses. It must take the evidence most favorable to the plaintiff, and if that makes a case for the jury he is entitled to have it passed upon by them. *Scott v. St. Louis, K. & N. W. R. Co.*, 112-54.

Where there is a real conflict of evidence the case is for the jury, and the court is not authorized to determine whether the preponderance is in favor of one or the other, nor to pass upon the credibility of the witnesses. *In re Betts' Estate*, 113-111.

On a motion to direct a verdict the party against whom it is asked is entitled to the most favorable construction which the facts will bear. The making of such a motion amounts to an admission of all matters which the testimony tends to prove. *Degelau v. Wight*, 114-52.

A motion to direct a verdict should be sustained when it clearly appears to the trial judge that it would be his duty to set aside a verdict in favor of the party on whom the burden of proof rests. *Cherry v. Des Moines Leader*, 114-298.

**SEC. 3724. Sealed verdict.**

[For earlier annotations, see code, pages 1452-3.—Ed.]

Where a sealed verdict is returned, in pursuance of an agreement, it is not error for the court to refuse to poll the jury and allow a juror to dissent from the verdict in which he concurred at the time it was sealed. *Dunbauld v. Thompson*, 109-199.

**SEC. 3726. Special defined.**

[For earlier annotations, see code, page 1453.—Ed.]

A special verdict must present the ultimate facts as established by the evidence. The fact to be found must be one inhering in and necessary to determine in arriving at the general verdict, and the method or elements considered in reaching the ultimate facts cannot be called for by special interrogatories. *Read v. State Ins. Co.*, 103-307.

A special verdict covers all the issues in the case, and is a substitute for a general verdict, while answers to interrogatories do not supersede the necessity for a general verdict. *Morbey v. Chicago & N. W. R. Co.*, 89 N. W., 105.

**SEC. 3727. Findings.**

[For earlier annotations, see code, pages 1453-7.—Ed.]

It is not error for the court to divide a special interrogatory asked. *Pratt v. Chicago, R. I. & P. R. Co.*, 107-287.

Special interrogatories which call for a finding of the jury as to ultimate and important facts bearing upon the issues may be proper, though calling for answers somewhat in the nature of conclusions. *Ibid.*

While it is the better practice not to submit interrogatories which do not call for ultimate facts, nevertheless submission of interrogatories as to matters which are relevant may be error without prejudice. *Nodle v. Hawthorn*, 107-380.

Where an interrogatory is such that in form it would not have been error to refuse to submit it, the failure of the jury to answer it is not a ground for a new trial. *Correll v. Cedar Rapids*, 110-333.

It is not reversible error to submit an interrogatory calling for an answer by way of a conclusion, where the general verdict necessarily covers the special finding. There is a manifest distinction between holding that the trial court may refuse to submit such question, and holding that there was prejudicial error in submitting it. *Taylor v. Wabash R. Co.*, 112-157.

Findings in answer to special interrogatories should relate to ultimate facts inhering in the verdict, deciding issues more or less important, necessary to be passed upon in making up the general verdict. Where the fact is absolutely essential to recovery, a finding negating its existence will be conclusive without more, but when the interrogatories do not

include all the issues essential to reach a legal conclusion, then it becomes of the utmost importance to know what extrinsic matters, if any, may be resorted to in aid of these findings. Every reasonable presumption is to be indulged in favor of the general verdict. All the essential facts inhere therein, when the contrary is not made to appear from the special findings. Therefore the evidence may not be resorted to in aid of the special findings as against the general verdict. *Schulte v. Chicago, M. & St. P. R. Co.*, 114-89.

Where an issue is submitted a party has the right to have the jury answer interrogatories for the purpose of ascertaining the grounds upon which a verdict is rendered. *Trumble v. Happy*, 114-624.

Interrogatories not requiring ultimate facts for answers may properly be refused. *Ibid.*

Special interrogatories calling for ultimate facts inhering in and necessarily to be determined in reaching a verdict, should be submitted if requested. *Decatur v. Simpson*, 88 N. W., 839.

Findings of fact in answer to interrogatories do not dispense with a general verdict. *Morbey v. Chicago & N. W. R. Co.*, 89 N. W., 105.

The questions submitted to the jury for answer should be controlling and call for the ultimate facts necessary to be determined in finding a general verdict. In a particular case held that the court properly refused to submit interrogatories which could not be categorically answered. *Ibid.*

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**SEC. 3728. Findings inconsistent with general verdict.**

[For earlier annotations, see code, pages 1457-8.—Ed.]

Where a special interrogatory remains unanswered it must be presumed in support of the general verdict that the jury found such facts as were necessary to sustain it. Failure to answer does not amount to failure to find the facts inquired about. *Huss v. Chicago G. W. R. Co.*, 113-342.

Judgment on special findings, notwithstanding the verdict, must rest on facts found by the jury, rather than those which

it is thought might or ought to have been found. *Schulte v. Chicago, M. & St. P. R. Co.*, 114-89.

To warrant a judgment upon special

findings against the general verdict such findings must be absolutely inconsistent therewith. *Crynes v. Independence*, 88 N. W., 937.

### SEC. 3735. Reference—without consent.

[For earlier annotations, see code, page 1459.—Ed ]

The cases involving accounts in which reference may be made without consent of parties are those of mutual accounts, such as were formerly cognizable in equity. *Tufts v. Norris*, 88 N. W., 367.

An account consisting substantially of

successive entries of amounts of money loaned does not constitute a mutual account justifying a compulsory reference in an action to recover the total amount due. *Frick v. Kabaker*, 90 N. W., 498.

### SEC. 3740. Report—judgment.

[For earlier annotations, see code, pages 1460-2.—Ed.]

An order setting aside the referee's report is in effect the granting of a new trial, and in such matters the court has a discretion, and its action will not be re-

versed on appeal unless it appears that the discretion has been abused. *Van Wagenen v. Parsons*, 106-263.

### SEC. 3746. Procedure.

[For earlier annotations, see code, page 1463.—Ed.]

After the time has expired within which reports are to be made, the referee ceases

to have authority to act and is without jurisdiction. *Manning v. Nelson*, 107-34.

### SEC. 3749. Exceptions—how taken.

[For earlier annotations, see code, pages 1464-6.—Ed ]

**Exceptions necessary.** A party should except to special findings with which he is not content even though the court renders judgment in his favor; otherwise on appeal such findings will be held conclusive as to him. *Aldrich v. Paine*, 106-461.

An exception to the judgment itself is not necessary where exception has been duly taken to the conclusion of law upon which the judgment is found. *Clement v. Drybread*, 108-701.

**Time for taking.** An exception must be entered at the time the decision is made, unless it be on motion or demurrer, and cannot be preserved by means of a subsequent motion unless there is ground for having a *nunc pro tunc* entry of the exception made. *Young v. Rann*, 111-253.

**Time for filing.** In the absence of express agreement or consent the judge has no power to sign a bill of exceptions after the final adjournment of the term, and if consent is given the bill must be filed within the time agreed upon or it will not be considered. *Hershey v. Nyenhuis*, 103-195.

Where at the time of overruling a motion for a new trial which was at a term subsequent to that of the trial of the case, time for filing bill of exceptions was fixed and the bill was filed within that time, held that it was sufficient. *National Horse Imp. Co. v. Novak*, 105-157.

Where it appears that the bill of exceptions was signed and filed after the time

fixed by the court therefor had expired, a motion to strike it from the record in the supreme court will be sustained. *Hopkins Fine Stock Co. v. Reid*, 106-78.

The filing of an amendment to the abstract for the purpose of making the abstract correspond to the record does not estop the appellee from claiming that the bill of exceptions was not filed within the proper time and cannot be considered. *Hershey v. Nyenhuis*, 103-195.

**Shorthand report.** This section simply declares that when the shorthand notes are duly certified and filed a formal bill of exceptions shall not be required, but the perfection of the record within the time limit must be made in one way or the other, and either the bill of exceptions or the report must be on file within such time in order to preserve the evidence as a part of the record. *In re Tobey's Estate*, 112-581.

Evidence taken down in shorthand after being transcribed may when duly certified by the trial judge become a part of the record without the certificate of the official reporter. *Philbrick v. University Place*, 106-352.

The translation of the stenographer's notes should be certified by the reporter who reports the proceedings, and not necessarily by the official reporter. *Spinney v. Halliday*, 88 N. W., 939.

Prior to the adoption of Code § 3675 the certificate of the reporter to his notes was

not essential in connection with their incorporation by reference into a skeleton bill of exceptions. *Sigler v. Murphy*, 107-128.

A skeleton bill incorporating the shorthand notes by reference is sufficient. It is not necessary that the clerk be directed to copy into the bill the original notes, but a recital that they were filed and that all the evidence, objections and exceptions having been extended and transcribed in long-hand and certified and filed in due time after such trial by such shorthand reporter, are as follows, to wit, etc., is sufficient. The clerk in extending the skeleton bill is expected to copy the transcript

made by the reporter, which will be sufficiently identified if properly entitled and duly certified and filed in the case. *Manatt v. Scott*, 106-203.

The instructions are sufficiently identified by referring to them as filed in the case by their numbers and as duly endorsed by the presiding judge. *Ibid.*

The evidence may be preserved by a skeleton bill of exceptions, signed by the judge, and filed in due time, wherein the reporter's shorthand notes, duly certified by the judge and reporter, and filed, are made a part of the bill by unmistakable reference. *Shaulis v. Buston*, 109-355.

### SEC. 3750. Form—grounds.

[For earlier annotations, see code, pages 1466-8.—Ed.]

An exception "to the giving of each and every of said instructions" is sufficient to

constitute an exception to each instruction given. *State v. Smith*, 107-487.

### SEC. 3753. Signing.

[For earlier annotations, see code, pages 1471-3.—Ed.]

In criminal cases a bill of exceptions signed by bystanders in a case where such form of bill of exceptions is proper may be filed within the time allowed by the court for filing a bill of exceptions. *State v. Taylor*, 103-22.

Bystanders cannot certify a bill of exceptions unless the judge has refused to do so, and the bill which they sign must show affirmatively that the judge has refused to indorse the correctness of its statements. *Chew v. O'Hara*, 110-81.

The embodiment of affidavits in a bill of exceptions does not make them competent evidence of a fact which should appear by the recitals of the bill of exceptions itself, such as the misconduct of an attorney which occurred, if at all, in the pres-

ence or within the knowledge of the court. *State v. Burton*, 103-28.

When a bill of exceptions is signed and filed it becomes a part of the record. It is not competent for the judge to change or modify it by a contradictory written statement or certificate filed with the papers of the case. *State v. Smith*, 107-480.

The fact that the statutory directions as to the drawing of jurors were not followed must be shown by bill of exceptions, and not by affidavit, it being presumed that the drawing was in the presence of the court, as required by the statute. *Moss v. Appanoose County*, 109-671.

As to embodying the shorthand report of the evidence in a skeleton bill, see notes to Code § 3749 in this Supplement.

### SEC. 3754. Must be on material point.

[For earlier annotations, see code, pages 1473-8.—Ed.]

That errors not prejudicial will not be ground for reversal on appeal, see notes to Code § 4139 in this Supplement.

### SEC. 3755. New trial—grounds for.

[For earlier annotations, see code, pages 1479-90.—Ed.]

In contempt proceedings. The statutory provisions as to new trial in civil cases are sufficiently comprehensive to include new trial in contempt proceedings and are applicable to them. *State v. Stevenson*, 104-50.

Discretion. The court interferes with reluctance with the trial court when a new trial is granted. Much latitude is allowed for the exercise of discretion, but it is a legal discretion that should control, and where the precise ground on which the court based its action appears, the supreme court has no hesitation in determining

whether such discretion has been abused. *Turley v. Griffin*, 106-161.

The action of a trial court in granting or refusing a new trial is largely one of discretion, and in the absence of an abuse of discretion the supreme court will not interfere. *Van Wagenen v. Parsons*, 106-263.

Where a motion for a new trial presents several grounds but it does not appear on what one or more of these grounds the granting of a new trial is based, it must appear, in order to warrant interference on appeal, that there was an unjust exer-

cise of discretion as to all of the grounds. *Ibid.*

A large discretion is vested in the trial court in granting a new trial, and the supreme court is slow to reverse where a new trial is granted. *Mally v. Mally*, 114-309.

**Misconduct of judge.** A trial court should not as a rule interfere with the examination of witnesses when the examination is being fairly conducted, except to rule upon objections and motions, but it is not required to remain silent when unwilling witnesses persist in such a course as will conceal the truth and make the trial a travesty on justice. *State v. Spiers*, 103-711.

It is not improper to say to a jury, especially where a case is on trial for the third time after two disagreements, that it is very important that a verdict should be arrived at, and send them out for further consideration, although they have already been out for quite a long time, and to ask them to make an earnest effort to arrive at a verdict. *State v. Olds*, 106-110.

In the absence of affirmative showing of want of prejudice the absence of the judge from the court room beyond the hearing of the proceedings during the arguments of counsel is error sufficient to warrant reversal. *State v. Carnagy*, 106-483.

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

By consent in advance, objection to absence of the judge during argument may be waived, even in a criminal case. *State v. Hammer*, 89 N. W., 1083.

Remarks made by the court in ruling on objections interposed by a party, held not to be objectionable as prejudicing the case of such party. *Crowell v. McGoon*, 106-266.

**Misconduct of jury** does not require the granting of a new trial unless it may be said to have influenced the result. A large discretion in passing upon such question is necessarily lodged in the trial court. *State v. Baughman*, 111-71.

**Quotient verdict.** Where the jurors after determining to render a verdict for plaintiff, and while considering the amount of the verdict, set down each the amount he was willing to allow, and these amounts were added up and the aggregate divided by twelve, which the jurors did not then agree to adopt but proceeded further to consider, and then subsequently agreed on as the proper amount, held that this conduct was not such as to vitiate the verdict. *Owen v. Christensen*, 106-394.

Where the jury returns a verdict, even though at the time the amount of the verdict is arrived at there is no express agreement to be bound by the result reached, if there is a fair inference from all that is said, that there was a tacit understanding among the jurors that they would abide the

result, this is sufficient to avoid the verdict. Nor is it necessary that every member of the jury be a party to the agreement. It is enough to vitiate the verdict if the greater number so agree. A verdict reached by adding together the estimates of the various jurors, and a subsequent assent to it is not alone sufficient to purge it of illegality, although such an illegal verdict may be repudiated and a valid one found as the result of due deliberation. *Sylvester v. Casey*, 110-256.

Where there is a conflict in the statements of the jurors as to whether there was any previous agreement to be bound by the result reached, by adding together the amounts voted for, the supreme court will not interfere with the holding of the trial court as to the legality of the verdict. *Hoover v. Mapleton*, 110-571.

**Drinking intoxicating liquors.** Under some circumstances the taking of intoxicating liquors by jurors from a witness might be such misconduct as to necessitate a new trial, but the mere indulgence in this social custom without anything more will not warrant the inference of wrong doing. *State v. Minor*, 106-642.

Where, during the progress of a trial, but before final submission of the case, a juror indulges in the use of intoxicating liquors, the verdict should not be disturbed unless prejudice is shown, and the fact alone that liquor was taken is not enough to vitiate the verdict. On the other hand, the rule is established that prejudice will be presumed if the liquor has been drunk after the jury has retired to consider the case. If the liquor is taken after the jury has reached a conclusion, and put the verdict in form, the verdict will not thereby be affected. *State v. Reilly*, 108-735.

**Improper statements.** Remarks made by a juror derogatory to a witness but sustained by evidence in the case, do not constitute misconduct of a juror. *State v. Cope-land*, 106-102.

Improper statements made by some jurors to others while they are deliberating will not authorize a new trial unless it appears that prejudice resulted from the statements or that they were of a character to cause prejudice and the presumption of prejudice has not been overcome. *State v. Olds* 106-110.

The action of a juror during the progress of the trial in indicating his conviction at the time as to what his final conclusion will be, does not necessarily require the setting aside of the verdict. *State v. Baughman*, 111-71.

Statements by a juror to his fellows while in the jury room as to facts within his personal knowledge relating to the subject matter of the suit will constitute prejudicial error, requiring a new trial. *Wilberding v. Dubuque*, 111-484.

**Disqualification of juror.** To take advantage of the disqualification of a juror

after verdict, it is incumbent on the party complaining to show affirmatively that neither he nor his counsel had knowledge thereof before the juror was sworn. *State v. Bussamus*, 103-11; *State v. Moats*, 108-13.

**Taking improper papers.** It is error for the jury to have a map brought before them which has not been introduced in evidence and use it in construing the evidence. *De Wulf v. Dix*, 110-553.

**How misconduct shown.** It is not competent to show by affidavits what transpires by way of misconduct of the jury in the presence of the court or judge unless the judge refuses to certify to the facts as they are claimed to be by the party desiring the certificate. *State v. Olds*, 106-110.

**Misconduct of counsel in argument.** Remarks of counsel made as of his own knowledge in connection with the testimony of a witness may constitute misconduct. *Goldthorp v. Goldthorp*, 106-722.

Counsel are not to be closely limited in their opening statements and misconception on their part as to the competency of evidence should not be ground for a new trial, unless so gross, or made under such circumstances as that prejudice may be inferred. *State v. Todd*, 110-631.

Remarks of counsel made in running comment during the trial, as well as those made in argument, may be ground for a new trial if improper and prejudicial, and in such case it is not necessary to show objections made to every question asked or statement made. *Welch v. Union Cent. L. Ins. Co.*, 90 N. W., 828.

Statements of the county attorney in a criminal prosecution that defendant was not only charged with crime but was guilty of it and that there were witnesses (referring to defendant's wife who was incompetent to testify against him) that he was not at home as claimed at the time the crime was committed, held not to be such as to call for a new trial. *State v. Miller*, 102-692.

**Misconduct of counsel—how shown.** Charges of the misconduct of an attorney as a ground for reversal on appeal will not be considered unless shown by the bill of exceptions where it appears that such misconduct, if it occurred at all, was in the presence or within the knowledge of the court. Such fact cannot be shown by affidavits, even though they are embodied in the bill of exceptions, but must appear from the recitals of the bill of exceptions itself. *State v. Watson*, 102-651; *State v. Burton*, 103-28; *Frank v. Davenport*, 105-588; *De Wulf v. Dix*, 110-553; *State v. Keenan*, 111-286.

It may be that when the misconduct is in the absence of the trial judge and therefore not within his knowledge, it may be shown by affidavits, but in such a case

counter affidavits also are admissible. *Faulk v. Iowa County*, 103-442.

A mere exception at the end of an argument is not enough to raise the question whether counsel has in the argument complied with the direction of the court as to the course to be pursued in such argument. *Klos v. Zahorik*, 113-161.

**Prejudice must appear.** The action of the trial court in overruling a motion for new trial, based on misconduct of counsel, will be interfered with only where its discretion appears to have been abused. *State v. Newhouse*, 88 N. W., 353.

**Prejudice cured.** Where objection was made to a statement of counsel in the opening of the case as to matters which could not properly be shown in evidence and the objection was sustained, and the jury was instructed not to consider anything except the evidence received on the trial, held that no prejudicial error was shown. *Taylor v. Pacific Mut. L. Ins. Co.*, 110-621.

While it is not proper to base an argument on facts not shown to have existed, error in doing so is cured by prompt action of the court in requiring the withdrawal of such remarks. *Mackerall v. Omaha & St. L. R. Co.*, 111-547.

**Excessive verdict.** It is the well established rule in this state that the trial court, when of opinion that a verdict for an excessive amount has been returned, may give the successful party the option to accept judgment for the amount which the court believes to be just or to submit to a new trial. *Baxter v. Cedar Rapids*, 103-599.

But the fact that the court requires the successful party to elect between such remission and a new trial does not show that the court finds the verdict to have been the result of passion or prejudice. *Ibid.*

**Verdict against the evidence.** Where the evidence is conflicting, it is the province of the jury to pass upon the conflict and the courts will not interfere with the verdict. *Inghram v. National Union*, 103-395.

In such case the conflict must be resolved in favor of the party against whom the motion for a new trial is made, and if there is not sufficient evidence to sustain a verdict for that party the motion should be sustained, otherwise it should be overruled. *Ibid.*

The function of the court with reference to the evidence is not fully and completely discharged when it determines the admissibility of the different items of evidence offered. It may still look into the whole case to see whether these items of evidence together constitute any substantial proof of the facts sought to be established. *Brooks v. Brotherhood of American Yeomen*, 88 N. W., 1089.

**Passion and prejudice.** Where the amount of plaintiff's recovery is not limited by the instructions, it cannot be said

from the size of the verdict alone that it is the result of passion or prejudice. *Connors v. Chingren*, 111-437.

The mere fact that the verdict is for an amount which the court finds to be excessive does not in it itself show such passion and prejudice as to require the entire setting aside of the verdict. *Doran v. Cedar Rapids & M. C. R. Co.*, 90 N. W., 815.

In a particular case held that the verdict was not the result of an intelligent and honest exercise of discretion by the jury, and that it was the result of passion or prejudice, and judgment based thereon was reversed. *Eastman v. Miller*, 113-404.

**Newly discovered evidence.** Considerable discretion is vested in the lower court in passing upon an application for a new trial on the ground of newly discovered evidence; and the supreme court will not interfere with the exercise of that discretion unless it appears to have been abused. *Trimble v. Tantlinger*, 104-665.

Where the newly discovered evidence, as shown by the affidavit, might or might not be of controlling weight as affecting the result, the action of the lower court in granting a new trial on that ground will not be interfered with. *Bullard v. Bullard*, 112-423.

In a particular case held that the showing as to newly discovered evidence was sufficient. *Mally v. Mally*, 114-309.

**Diligence.** Lack of diligence to procure the newly discovered evidence for use on the trial will be a proper ground for refusing to entertain a motion for a new trial based on such newly discovered evidence. *Baxter v. Cedar Rapids*, 103-599.

Under the circumstances of a particular case held that there was not such want of diligence in discovering the new evidence as to prevent the granting of a new trial on that ground. *National Horse Importing Co. v. Novak*, 105-157.

### SEC. 3756. Application—affidavits.

[For earlier annotations, see code, pages 1490-3.—Ed.]

A motion made under this section will not bar an application for new trial in an action to recover real property, which may be made within one year, under the provisions of Code § 4205, but it is doubtful whether the latter application may be interposed on the same grounds which have been urged in a motion under this section. *Bevering v. Smith*, 90 N. W., 840.

In computing the three days within which the motion is to be filed, Sunday or Decoration day, or other day on which judicial business is not required to be transacted, is not to be excluded. *German Sav. Bank v. Cady*, 114-228.

**Affidavits of jurors** cannot be consid-

ered as to matters which inhere in the verdict. *Noble v. White*, 103-352.

The affidavits of jurors showing the arguments or reasons which were urged among themselves tending to increase the amount of the recovery are not admissible; such matters inhere in the verdict. *Baxter v. Cedar Rapids*, 103-599.

**Cumulative evidence.** A new trial will not be granted on account of the discovery of new evidence which is merely cumulative. *Dumbauld v. Thompson*, 109-199.

Evidence tending merely to strengthen the proof as to any one or more particular facts will be cumulative, but evidence of some other fact, as to which there is no proof, but which would aid to the same general conclusion indicated by evidence which is introduced, will not be deemed cumulative. *Bullard v. Bullard*, 112-423.

**Errors of law** excepted to. The giving of an erroneous instruction not duly excepted to will not, it seems, be proper grounds for granting a new trial. *Turley v. Griffin*, 106-161.

**Motion.** In order to obtain a new trial the aggrieved party must apply therefor. A new trial will not be granted to him under a motion for judgment notwithstanding the verdict. *Hooker v. Chittenden*, 106-321.

The purpose of a motion for a new trial is to bring before the court errors which without it would not be called to its attention, and the filing of a motion of this kind on certain grounds stated does not waive errors with reference to other matters to which the court's attention has been previously directed and as to which exceptions have been saved. *Stewart v. Equitable Mut. L. Assn.*, 110-528.

ered as to matters which inhere in the verdict. *Noble v. White*, 103-352.

The affidavits of jurors showing the arguments or reasons which were urged among themselves tending to increase the amount of the recovery are not admissible; such matters inhere in the verdict. *Baxter v. Cedar Rapids*, 103-599.

Affidavits of jurors are not admissible to show what their understanding was of the instructions. *Christ v. Webster City*, 105-119.

As to affidavits as showing misconduct of jury or counsel, see notes to preceding section.

**SEC. 3757. Judgment notwithstanding verdict.**

[For earlier annotations, see code, page 1493.—Ed.]

Under a motion for a judgment notwithstanding the verdict, grounds cannot be considered which should properly be presented in a motion for a new trial, nor can such a motion be treated as a motion for a new trial. *Hooker v. Chittenden*, 106-321.

Motion for judgment notwithstanding

the verdict does not waive the right to complain of errors on appeal. *Cullison v. Lindsay*, 108-124.

Where a petition shows on its face that there is no cause of action, the objection may be taken by the defendant after a verdict against him by motion as here provided. *Ary v. Chesmore*, 113-63.

**SEC. 3758. Arrest of judgment.**

[For earlier annotations, see code, page 1493.—Ed.]

Although a demurrer to a petition to recover damages for personal injuries based on the failure of plaintiff to allege freedom from contributory negligence is overruled, nevertheless the same objection may

be made by motion in arrest of judgment. If plaintiff does not cure the defect as provided in Code § 3760, the motion on that ground may be properly sustained. *Decatur v. Simpson*, 88 N. W., 839.

**SEC. 3760. Amendment to cure defect.**

[For earlier annotations, see code, page 1493.—Ed.]

After motion in arrest of judgment for defect in the pleading, the opposite party may amend by alleging the omitted fact, and such fact will be deemed to be true unless controverted. So held as to the alle-

gation of freedom from contributory negligence in an action to recover for personal injuries. *Beard v. Guild*, 107-476; *Decatur v. Simpson*, 88 N. W., 839.

**SEC. 3764. Dismissal of action.**

[For earlier annotations, see code, pages 1494-5.—Ed.]

After the announcement of the court's conclusion on a motion to direct a verdict, the plaintiff may dismiss his action. *Oppenheimer v. Elmore*, 109-196.

Dismissal of an action being shown it will be presumed to have been without prejudice, unless the contrary appears. *Citizens Bank v. Whinery*, 110-390.

After submission of the case plaintiff is not entitled to a dismissal on his own motion, and a dismissal thus improperly entered may be subsequently set aside by the court and the case reinstated. *Costello v. Costello*, 112-578.

**SEC. 3766. Counter-claim tried.**

[For earlier annotations, see code, page 1496.—Ed.]

When dismissal of the case is properly announced and brought to the court's knowledge, the case is in fact dismissed, although the court may proceed further before entering the fact of dismissal on the record. *Bardes v. Hutchinson*, 113-610.

When the action is dismissed by plaintiff, defendant is not entitled to have the court proceed further, unless his answer presents a proper counterclaim. *Ibid.*

**SEC. 3769. Judgment—final adjudication.**

[For earlier annotations, see code, pages 1496-8.—Ed.]

The costs are not a part of the judgment and may be retaxed on motion without proceedings to set aside, vacate or modify the judgment. *Fisher v. Burlington, C. R. & N. R. Co.*, 104-588.

**When rendered.** A judgment cannot be deemed as rendered so as to become a lien or support an execution until it is entered of record. The mere signature of a judgment form, and the indorsement and filing thereof by the clerk is not a judgment. *Callanan v. Votruba*, 104-672.

**Final.** A judgment determining the amount due may be final although a subse-

quent order as to the application of funds in the hands of a receiver may be necessary. *Applegate v. Applegate*, 107-312.

**Jurisdiction.** A defendant served with notice outside the state, and not appearing in the action, is not bound by the adjudication. *Smith v. Moore*, 112-60.

**Presumption.** Every presumption must be indulged in favor of the correctness of a judgment. *State v. Gifford*, 112-648.

**Former adjudication.** Where a former adjudication is relied upon, it must appear either by the record or by extrinsic evidence that the particular matter in con-

troverly was necessarily tried and determined in the former action. The burden is with the party relying upon a former adjudication to make it appear that the case was thus determined. *Griffith v. Fields*, 105-362.

Where in an action on a promissory note brought by a holder thereof, the maker sought to interpose as a defense damages for breach of contract in the transaction in which the note was given, and claimed that the holder was not an innocent purchaser, held, that in a subsequent action by the maker of the note against the original payee for damages for breach of the contract the prior judgment in favor of the holder of the note would not constitute an adjudication unless it was shown by parol evidence that the case was decided on account of the defense to the note and not on account of the holder having been found to be an innocent purchaser. *Ibid.*

The general rule, subject to some exceptions, is that a judgment is conclusive, not only as to all matters actually in issue, but as to those which might or should have been alleged in the pleadings. *Fulliam v. Drake*, 105-615.

Any defense which might have been set up in a previous action will be deemed adjudicated by the judgment thereon. *Talbot v. First National Bank*, 106-361.

The judgment against a plaintiff who has stood on his petition and refused to amend after ruling against him on demurrer is a final adjudication. *Gregory v. Woodworth*, 107-151.

A party cannot relitigate in a second action matters which were incident to or involved in or might have been litigated in a former action. *Prouty v. Matheson*, 107-259.

One of the recognized tests in determining whether the plea of another action pending is good, lies in ascertaining whether the judgment, when obtained, would necessarily be *res adjudicata* of the issues of the action wherein the plea is interposed. *Valley Bank v. Shenandoah Nat. Bank*, 109-43.

### SEC. 3773. Several judgment.

[For earlier annotations, see code, pages 1498-9.—Ed.]

If plaintiff maintains his action against one of several defendants he may have judgment against that one, and the other defendants may have judgment against

Where the very right to recover is based on precisely the same ground in both actions, the judgment in the one will be conclusive in the other. It is not essential that the causes of action be the same, but the right or title on which they rest must be identical. *Watson v. Richardson*, 110-698.

The provisions of Code § 4128 with reference to supersedeas bond indicate an intention to preserve to the prevailing litigant the fruits of his judgment, even though an appeal has been taken, and a judgment pending on appeal to the supreme court may be relied on as a prior adjudication in another case involving the same right or title. *Ibid.*

When a person is responsible over to another, either by operation of law or by express contract, and he is duly notified of the pendency of a suit and requested to take upon himself the defense of it, he is no longer regarded as a stranger, because he has the right to appear and defend the action, and has the same means and advantages of controverting the claim as if he was a real and nominal party upon the record. In every such case, if due notice is given to such person, the judgment, if obtained without fraud or collusion, will be conclusive against him whether he has appeared or not as to every fact established by it. But, in general, judgment cannot be entered against a person so notified. *Citizens Nat. Bank v. City Nat. Bank*, 111-211.

Parties cannot engage in relitigation of matters which were, or might have been, determined in a former action. *Murphy v. Cuddihy*, 112-645.

A judgment cannot be deemed an adjudication of the question which the court expressly does not determine, although it might have been determined. *Owen v. Higgins*, 113-735.

Where a suit in equity is dismissed on its merits, such dismissal constitutes a bar to a subsequent suit presenting the same question. *Madison v. Garfield Coal Co.*, 114-56.

plaintiff for costs. This rule is alike applicable to actions *ex contractu* and *ex delictu*. *Lull v. Anamosa Nat. Bank*, 110-537.

### SEC. 3775. What relief granted.

[For earlier annotations, see code, page 1499.—Ed.]

Where there is an answer the court may grant plaintiff any relief consistent with the case made by the petition and embraced within the issue. *Stubblefield v.*

*Gadd*, 112-681; *Hogueland v. Arts*, 113-634.

**Prayer.** The judgment must follow the prayer for relief and cannot be extended beyond it. *Browne v. Kiel*, 90 N. W., 624.

**SEC. 3781. Judgment by agreement.**

[For earlier annotations, see code, pages 1500-1.—Ed.]

To make a judgment by consent or agreement, the fact must appear of record. *Cooper v. Disbrow*, 106-550.

**SEC. 3783. Court acting as jury.**

[For earlier annotations, see code, page 1501.—Ed.]

The decision of the court on a question of fact in a law case tried without a jury is entitled to the same presumptions as the verdict of a jury. *Brown v. Curtis*, 111-542.

Where a law case is tried to the court without a jury its finding has the force and

effect of a verdict, and will not be interfered with unless it be the result of passion or prejudice, or so clearly against the evidence as to justify the conclusion that it was not the result of an honest and fair discretion. *Roe v. McCaughan*, 113-274.

**SEC. 3784. Judgments and orders entered.**

[For earlier annotations, see code, page 1501.—Ed.]

The record book, and not the judgment docket, is the evidence of the judgment, and it, or a certified copy, is alone admissible to show the judgment where no foundation is laid for introducing secondary evidence. *Baxter v. Pritchard*, 113-422.

Ordinarily the record is the best and only proof of a judgment. An order of court, to be of any validity, must be entered of record. *Bristol Sav. Bank v. Judd*, 89 N. W., 93. See also notes to Code § 288 in this Supplement.

**SEC. 3788. Default—when made and entered.**

[For earlier annotations, see code, pages 1503-5.—Ed.]

A judgment by default is conclusive as against collateral attack, even though the defendant is vulnerable to demurrer. *Miller Brewing Co. v. Capital Ins. Co.*, 111-590.

A party may be concluded by judgment on default, even though the facts stated in the petition do not constitute a good cause of action at law, or the petition is so defective as to be vulnerable to a demur-

rer. Nor will the fact that the judgment is excessive in amount be available to a defendant in default. *Warthen v. Himstreet*, 112-605.

It is not proper to render judgment on sustaining a motion striking an amended petition from the files without giving plaintiff the statutory time for amending. *Williams v. Williams*, 88 N. W., 1057.

**SEC. 3790. Setting aside default—terms.**

[For earlier annotations, see code, pages 1505-8.—Ed.]

The party asking to have default set aside must plead issuably and also present a reasonable excuse for the default. *Martin v. Reese*, 105-694.

Where a court has no jurisdiction to enter a default by reason of want of service, a judgment may be set aside on motion without pleading forthwith or filing affidavits of merits. *Spencer v. Berns*, 114-126.

Affidavit in a particular case held not sufficient to require the setting aside of a default, as it disclosed merely carelessness and inattention to duty on the part of the party against whom the judgment was rendered. *Byrnes v. American Mut. F. Ins. Co.*, 114-738.

The supreme court on appeal will not interfere with the action of the trial court in refusing to set aside a default except in

clear case of abuse of discretion. *Martin v. Reese*, 105-694.

A fair trial on the merits is the object sought in all judicial proceedings, and, in the absence of negligence on the part of him who is in default, is to be encouraged and secured by the court. When the right to such trial is granted an appellate court is loath to interfere and will do so only in case of abuse of discretion on the part of the trial court. *Sitzer v. Fenzloff*, 112-491.

A very large discretion is vested in the trial court in the matter of setting aside default, and its action in allowing a trial on the merits will not be interfered with unless in a manifest case of abuse. The trial court may even rest such action upon matters within its own knowledge. *Foley v. Leisy Brg. Co.*, 89 N. W., 230.

**SEC. 3791. Clerk to compute amount.**

[For earlier annotations, see code, pages 1508-9.—Ed.]

The clerk is only authorized to assess when the action is for a money demand

and the amount a mere matter of computation. *Sitzer v. Fenzloff*, 112-491.

**SEC. 3794. Setting aside, if on notice by publication.**

Where the assignee in insolvency for a foreign corporation appeared in an attachment proceeding against such corporation in this state commenced by publication only, but afterwards failed to make de-

fense, and judgment was rendered against the corporation, held that a receiver of the corporation subsequently appointed could not have default set aside under this section. *State Bank v. McElroy*, 106-258.

**SEC. 3796. New trial after judgment, on publication.**

[For earlier annotations, see code, pages 1510-11.—Ed.]

A judgment rendered on service by publication may be set aside and a retrial granted on application of defendant within two years, but such judgment cannot be attacked in an independent action. *Co-operative Sav. & L. Assn. v. McIntosh*, 105-697.

Within the time authorized by this section a defendant served by publication only, may appear and file a motion to set aside the judgment, and with it an answer to the

petition in the original action. *Provident Bank Stock Co. v. Schafer*, 110-440.

The provisions of this section do not apply where personal service of the notice has been made out of the state on a non-resident defendant. *Clark v. Tull*, 113-143.

In a proceeding by the publication of notice the judgment does not become permanent and final until the expiration of the time within which a new trial may be asked under this section. *Williams v. Doolittle*, 88 N. W., 350.

**SEC. 3801. Liens of judgments.**

[For earlier annotations, see code, pages 1511-15.—Ed.]

One who seeks to enforce payment of a judgment out of the real estate of one deceased, must do so before the lien of his judgment expires. The filing of a claim against the estate of the deceased will not preserve the right to enforce such judgment against real estate. *Hansen's Empire Fur Factory v. Teabout*, 104-360.

A judgment is not "rendered" so as to become a lien until it is entered of record. *Callanan v. Votruba*, 104-672.

A judgment plaintiff in lawful possession of land on which his judgment is a lien has not the right to apply the rents and profits derived therefrom to the satisfaction of his judgment as against the owner thereof not a judgment defendant. *Boggs v. Douglass*, 105-344.

Judgments are liens upon equitable titles. *Kelliher v. Sutton*, 89 N. W., 26.

A judgment rendered against the holder

of an equitable title will not be a lien against the property in such sense as to charge subsequent *bona fide* purchasers of the legal title without notice. *Block & Polak Iron Co. v. Holcomb-Brown Iron Co.*, 105-624.

While ch. 129 of Acts 17 G. A. (now embodied in this section) requiring the filing of transcripts in the federal courts in counties where the property is situated in order to make such judgments liens on such property was not valid when enacted, nevertheless, when congress in 1888 provided that federal judgments should be liens throughout the state where rendered, in the same manner and to the same extent, and under the same conditions only as if said judgments and decrees had been rendered by a court of general jurisdiction of the state, this statutory provision became effectual. *Blair v. Ostrander*, 109-204

**SEC. 3802. When attach—filing transcript in another county.**

[For earlier annotations, see code, page 1515.—Ed.]

To make a judgment from another county a lien, the judgment must be indexed, as

here required. *State Ins. Co. v. Prestage*, 90 N. W., 62.

## CHAPTER 10.

## OF JUDGMENT BY CONFESSION.

**SECTION 3816. Judgment—execution.**

[For earlier annotations, see code, page 1518.—Ed.]

When the confession of judgment is filed, the clerk should enter up a judgment thereon, and if he fails to do so the court may subsequently order judgment to be

entered *nunc pro tunc* as of the date of the filing of the confession, thereby supporting an execution which has in the meantime been issued. *Doughty v. Meek*, 105-16.

A judgment entered on confession is deemed to have been entered by the court, and is entitled to the same faith and credit in another state as any other judgment. *Miller Brg. Co. v. Capital Ins. Co.*, 111-590.

### SEC. 3818. After action brought.

[For earlier annotations, see code, page 1519.—Ed.]

Even though the paper is headed "an offer to compromise," if in fact it is an offer to confess judgment it should be so treated. *Benson v. Chicago & N. W. R. Co.*, 113-179.

## CHAPTER 11.

### OF OFFER TO COMPROMISE.

#### SECTION 3819. Offer of judgment.

[For earlier annotations, see code, page 1520.—Ed.]

One who is authorized to collect a claim has authority to accept a confession of judgment for such claim. *Briggs v. Yetzer*, 103-342.

The law requires that the confession concisely state the facts so as to direct the attention of third parties to the nature and character of the consideration. Such statement must be brief and need not be specific or particular. *Ibid.*

If the statement is full enough to enable third parties to investigate and judge of the good faith of the transaction and sufficiently definite for this purpose, then the object of the statute in requiring such statement has been met. *Ibid.*

The jurat of the notary showing that the statement has been subscribed and sworn to is sufficient to show that it was subscribed and sworn to by the persons signing it, without the names of such persons being stated therein. *Ibid.*

An offer to confess judgment after an action is brought, may be made in the presence of the plaintiff or after notice to him, and may be established by parol testimony; but it is a part of the court proceedings and when made before a justice of the peace should be entered on his docket. *Sloss v. Bailey*, 104-696.

#### SEC. 3820. Conditional offer.

The offer here contemplated is different from that provided for under Code § 3818 with reference to offer to confess judgment. That section contemplates an acceptance or refusal of the offer when made; but even if the offer is one of compromise instead

of confession of judgment, the party to whom it is made may so act during the period allowed for signifying acceptance as to bind himself by an election not to accept. *Benson v. Chicago & N. W. R. Co.*, 113-179.

## CHAPTER 12.

### OF RECEIVERS.

#### SECTION 3822. When and how appointed.

[For earlier annotations, see code, pages 1521-3.—Ed.]

Where a corporation, organized to carry on a work of public improvement, had become insolvent and unable to prosecute the work so that a forfeiture of its franchises would follow and the value of its property would largely depreciate and the public interests be jeopardized, held, that the case was a proper one for the appointment of a receiver on the application of creditors. *Boston Inv. Co. v. Pacific Short Line Bridge Co.*, 104-311.

In such a case, held, that it was not error to order the sale of the property immediately upon the appointment and qualification of the receiver. *Ibid.*

And held, that an officer of the company who did not make his objection until after the appointment of the receiver and the sale of the property had been ordered was too late to be heard. *Ibid.*

The appointment of a receiver for a corporation limits the power of the corporation only to the extent that it is deprived of its property. *Weigen v. Council Bluffs Ins. Co.*, 104-410.

An order of court appointing the clerk of the court as receiver, although improper, cannot be questioned in an action by the receiver to recover a debt owing to the

insolvent debtor. *Metropolitan Nat. Bank v. Commercial State Bank*, 104-682.

One may be a receiver *de facto* although he has not given any bond, and the fact that where the clerk is appointed receiver he cannot properly approve a bond given by himself, will not render his acts as receiver invalid on collateral attack. *Ibid.*

The general rule seems to be that a receiver will be appointed in creditors' suits when the property is in danger of waste, almost as a matter of course. *Hirsch v. Israel*, 106-498.

A mortgagee may be entitled to the appointment of a receiver in case of levy on the mortgaged property under a claim senior to that of the mortgage, it appear-

ing that delay in sale of the property in due course of business would result in irreparable injury. Whether a receiver should be appointed is usually a matter within the sound judicial discretion of the court. *Valley Nat. Bank v. Claffin Co.*, 108-504.

Where the only assets of a partnership consisted of property which has been used in carrying on the partnership, the purpose of which is ended, a receiver should be appointed to close up its affairs. *Taylor v. Wells*, 113-326.

Fees and expenses of the receivership should be paid out of the funds in the hands of the receiver. *Harrington v. Foley*, 108-287.

### SEC. 3824. Power of.

[For earlier annotations, see code, pages 1523-5.—Ed ]

The receiver of the property of a party to a litigation is not a necessary party to such litigation if no attempt is made thereby to interfere with the right of the receiver to the property intrusted to his care. *State Bank v. McElroy*, 106-258.

While the right of a receiver to appear in an action brought outside the state in which he was appointed is generally denied, yet he is frequently permitted to do so as a matter of comity. *Ibid.*

A receiver appointed by a court of foreign jurisdiction cannot maintain suit in this state to enforce recovery of a claim due under the laws of his state against a citizen of this state. *Wyman v. Eaton*, 107-214.

A foreign receiver appointed as ancillary receiver in a proceeding in the courts of this state, and duly qualifying and giving bond as such, may maintain an action in this state. *Seymour v. Aultman*, 109-297.

While a foreign receiver will not be allowed as such, to bring action in the courts of this state, yet, if he has a right of action by assignment, and not merely by virtue of his appointment as receiver, he may maintain the action. *Hale v. Harris*, 112-372.

The right to dispose of property is not affected by an application for the appointment of a receiver, and such right continues at least until the making of the order of appointment. *Smith v. Sioux City Nursery & Seed Co.*, 109-51.

A receiver has no authority to execute a negotiable instrument for the corporation of which he is receiver. *Peoria Steam Marble Works v. Hickey*, 110-276.

As the receiver is subject to the order of the court, and the property and funds in his hands are in court, it is proper for the court to give direction to the receiver as to priority of claims. *Hart v. Nonpareil Printing & Pub. Co.*, 109-82.

In the proceedings by the state auditor under statutory provisions to wind up a banking corporation, the court may require the payment by stockholders (under their double liability as fixed by statute) of an assessment deemed reasonably sufficient to meet the liabilities of the bank, without waiting for the final distribution of the assets. *State v. Union Stock Yards State Bank*, 103-549.

If the statute makes stockholders liable to the extent of their respective shares of stock for debts due at the time of the dissolution of the corporation, a receiver appointed in an action brought to wind up the corporation may enforce this liability against the shareholders. Where the law contemplates a fund for distribution, such distribution is to be made by the receiver. *Ibid.*

The costs and expenses of the receivership are to be paid out of the property and such claims take priority over existing liens thereon. *Gallagher v. Gingrich*, 105-237.

**SEC. 3825. Priority of liens—taxes.** Persons having liens upon the property placed in the hands of a receiver shall, if there is a contest as to their priority, submit them to the court for determination. Provided, that when the assets of any corporation, partnership or person shall be placed in the hands of a receiver, all taxes against said corporation, partnership or person, whether levied under the laws of the state or ordinances of municipal corporations, shall be entitled to priority and be first paid in full by the receiver and claims therefor need not be filed with said receiver. [29 G. A., ch. 140, § 1.]

The receiver takes the debtor's property subject to the payment of all valid prior liens, but preferences already agreed upon at the time of the receiver's appointment,

not based on existing liens, will be disregarded. *Smith v. Sioux City Nursery & Seed Co.*, 109-51.

## CHAPTER 13.

### OF SUMMARY PROCEEDINGS.

#### SECTION 3826. Judgments on motion.

[For earlier annotations, see code, page 1526.—Ed.]

This section has no application where one attorney seeks to compel another to pay over a share of the fees received by the latter under a contract between them. *Downs v. Davis*, 113-529.

The remedy under this section against an attorney is not limited to cases of bad faith; nor is the power of the court to act precluded by the fact that there is a controversy as to whether the relation of client and attorney existed when the money was received. *Union Bldg. & Sav. Assn. v. Soderquist*, 87 N. W., 433.

The fact that the client has a legal remedy for the recovery of the money does not affect the right of the court to entertain the proceeding. *Ibid.*

In this summary proceeding the court has the power to adjust any set-off which the attorney may have on account of fees or other charges due to him in connection with the proceeding in which he received the money in question, or as the result of any other services for which he has a lien on money of his client coming into his hands. *Ibid.*

The court may, upon proper showing render judgment summarily against the clerk for money received by him, or make such order as would protect the rights of parties to the fund. *Hornish v. Ringen Stove Co.*, 89 N. W., 95.

#### SEC. 3830. No written pleadings.

[For earlier annotations, see code page 1526.—Ed.]

The ground of jurisdiction is the misconduct of the officer. The court is simply called upon to enforce the plain duty of the attorney without the aid of a jury or

written pleadings, and the remedy relates exclusively to an accounting between the attorney and the client. *Downs v. Davis* 113-529.

## CHAPTER 14.

### OF MOTIONS AND ORDERS.

#### SECTION 3834. Notice of motion.

[For earlier annotations, see code, page 1527.—Ed.]

Where the action is for specific performance but the contract on which it is based provides for the payment of money only without involving any special property, the plaintiff will not be entitled to any

relief although a money judgment is asked. In such a case a motion will not lie to transfer to the law docket. *Hull v. Hull* 90 N. W., 496.

#### SEC. 3846. Filed and entered.

Where there is a record of an order made by a judge in vacation, such record is the

best evidence of the order. *Bristol Sav Bank v. Judd*, 89 N. W., 93.

## CHAPTER 15.

### OF SECURITY FOR COSTS.

SECTION 3847. **When required.** If a defendant, at any time before answering, shall make and file an affidavit stating that he has a good defense

in whole or in part, the plaintiff, if he is a non-resident of this state, or a private or foreign corporation, before any other proceedings in the action, must file in the clerk's office a bond, with sureties to be approved by the clerk, in an amount to be fixed by the court, for the payment of all costs which may accrue in the action in the court in which it is brought, or in any other to which it may be carried, either to the defendant or to the officers of the court. The application for such security shall be by motion, filed with the case, and the facts supporting it must be shown by affidavits annexed thereto, which may be responded to by counter affidavits on or before the hearing of the motion, and each party shall file all his affidavits at once, and none thereafter. And a non-resident intervenor shall be required in like manner, to give a bond on motion of any party required to answer his petition of intervention. [C. '73, § 2927; R., §§ 3442, 3448.] [27 G. A., ch. 100, § 1.]

[For earlier annotations, see code, pages 1528-9.—Ed.]

The provisions of this section have no non-resident. *Petty v. Hayden*, 88 N. W., reference to a case of intervention by a 339.

**SEC. 3849. When plaintiff becomes non-resident.** If the plaintiff or any intervenor in an action, after its institution and at any time before its final determination, becomes a non-resident of this state, he may be required to give security for costs in the manner provided in the preceding sections of this chapter. [C. '73, § 2929; R., § 3444.] [27 G. A., ch. 100, § 2.]

[For annotations, see code, page 1529.—Ed.]

**SEC. 3851. Attorney or other officer not received.**

[For earlier annotations, see code, page 1529.—Ed.]

An attorney is not competent as surety *ley Nat. Bank v. Garretson*, 104-655; *Hudson v. Smith*, 111-411.

## CHAPTER 16.

### OF COSTS.

**SECTION 3853. Recoverable by successful party.**

[For earlier annotations, see code, pages 1530-1.—Ed.]

The general rule is that costs shall be recovered by the successful party and the fact that a defense has been made in good faith and upon reasonable grounds does not relieve such defendant if unsuccessful from the payment of costs. *In re Proctor's Estate*, 103-232.

The judgment may provide for interest on costs and attorneys' fees as well as on the principal sum for which the judgment is rendered. *Hoyt v. Beach*, 104-257.

Unnecessary expenses of counsel in tak-

ing depositions made necessary by the act of the opposite party in giving notice to take depositions at different places, before such depositions were finally secured, cannot be taxed as costs. *Grapes v. Grapes*, 106-316.

The expense of making an abstract of the evidence for use in the trial court is not so taxable. *Ibid.*

Without any prayer therefor in the petition costs follow the judgment. *Mountain v. Low*, 107-403; *Reed v. Corrigan*, 114-638.

**SEC. 3854. Apportionment.**

[For earlier annotations, see code, pages 1531-2.—Ed.]

Where there was recovery by the plaintiff on his cause of action and by the defendant on his counterclaim and it appeared that the time occupied and the number of witnesses was substantially equal

as to the two issues, held, that the costs should have been equally apportioned between the two parties. *White v. Ledbetter*, 104-71.

**SEC. 3855. Collection.**

[For earlier annotations, see code, page 1532.—Ed.]

The party against whom judgment is rendered is primarily liable for all costs to the parties entitled thereto, but the successful party has no right to enforce judgment for costs, except so far as such costs have been paid by him. *Hidy v. Hanson*, 89 N. W., 39.

**SEC. 3862. Clerk to tax.**

[For earlier annotations, see code, page 1533.—Ed.]

A motion to retax costs may cover taxation of attorney's fees fixed by the court, for the clerk taxes these as well as other costs, although the court determines the amount. *Bankers Iowa State Bank v. Jordan*, 111-324.

**SEC. 3864. Retaxation.**

[For earlier annotations, see code, page 1534.—Ed.]

A motion to retax costs may be considered without any proceedings to set aside, modify, or correct the judgment. The costs are properly no part of the judgment. *Fisher v. Burlington, C. R. & N. R. Co.*, 104-588.

A motion to retax costs covers error of the court in fixing the amount of attorney's fees to be allowed under Code § 3869 in action on written contract. *Bankers Iowa State Bank v. Jordan*, 111-324.

Error in allowance of attorney's fee on foreclosure of mortgage cannot be corrected by such motion since the right to the at-

torney's fee is determined by the judgment. *Perry v. Kaspar*, 113-268.

It is only when a mistake has been made by the clerk in the taxation of costs that a motion to correct is essential before a review may be had on appeal. Where an attorney's fee has been taxed in the judgment, the correctness of the action of the court may be reviewed without raising the question by motion to retax costs. *Ainley v. American Mut. F. Ins. Co.*, 113-709.

The right to recover costs is determined by the judgment, and not on motion to retax. *Fairbairn v. Dana*, 68-231.

**SEC. 3869. Attorneys' fees—when taxed as costs—amount.**

[For earlier annotations, see code, pages 1534-5.—Ed.]

In an action on a written contract the court may fix the attorney's fees without taking evidence, and the clerk may tax up the amount fixed by the court with the other costs. The correctness of the taxation of the fee by the court may be raised in a motion for retaxation of costs. *Bankers Iowa State Bank v. Jordan*, 111-324.

Where several notes are sued on in the same action, which might separately have been the basis of different actions, the attorney fee is to be fixed with reference to the several amounts, and not on the basis of the recovery of one lump sum. *Ibid.*

Attorney's fees may be allowed on the foreclosure of a note and mortgage,

although such fees have also been allowed in an action *in rem* in another state in which a portion only of the indebtedness was collected. *Smith v. Moore*, 112-60.

Where the attorney's fee is fixed and allowed by the judgment, it is not necessary to move to retax the costs in order to raise on appeal the correctness of the judgment in that respect. Such a fee is not necessarily a part of the judgment, but, as well as other costs, may be made so. *Ainley v. American Mut. F. Ins. Co.*, 113-709.

The "return day" is the second day of the term, or default day. *Bankers Iowa State Bank v. Jordan*, 111-324.

## TITLE XIX.

### OF ATTACHMENTS, GARNISHMENT, EXECUTIONS, AND SUPPLEMENTARY PROCEEDINGS.

#### CHAPTER 1.

##### OF ATTACHMENTS.

#### SECTION 3878. Grounds—not stated in alternative.

[For earlier annotations, see code, pages 1538-9—Ed.]

The statute permits amendments of the petition to show that a legal cause of attachment existed at the time the writ was issued. *Citizens Nat. Bank v. Converse*, 105-669.

A landlord, claiming that a sale by a tenant of exempt property is fraudulent cannot proceed by landlord's attachment, but only under the general provisions for attachment. *Hillman v. Brigham*, 110-220.

#### SEC. 3883. For debts not due—grounds.

[For earlier annotations, see code, page 1541.—Ed.]

The obligation to pay rent is created when a valid lease is entered into between the parties, and ordinarily nothing but

time is wanting to fix an absolute indebtedness. *Brown v. Cairns*, 107-727.

#### SEC. 3887. Action on bond.

[For earlier annotations, see code, pages 1542-7.—Ed.]

Independently of statute. An action will lie for the wrongful and malicious institution of a civil suit where an attachment has been issued as auxiliary to the main action, and such action need not be by counterclaim on the attachment bond, nor need it be on the bond. *Carraher v. Allen*, 112-168.

The cause of action for wrongful attachment, irrespective of the bond, accrues when the property is taken, or at least when it is sold under the writ. *Smyth v. Peters Shoe Co.*, 111-388.

**Want of ground.** It will not render the attachment wrongful that it is not sued out against the principal debtor who is insolvent, although there is a surety who is solvent but who is not made party to the action. *Richardson v. Probst*, 103-241.

On a question whether an attachment was wrongfully sued out on the ground that the debtor was about to dispose of his property, mortgages by the debtor subsequent to the levy but on the same day, and the fact that another creditor telegraphed to attaching plaintiff that the debtor was sure to fail, etc., were held admissible. *Citizens Nat. Bank v. Converse*, 105-669.

The question as to reasonable cause of belief relates to the ground upon which the attachment was issued. *Ringgen Stove Co. v. Bowers*, 109-175.

**Right to recover.** Where two writs of attachment were sued out by different creditors against the same debtor, held that release of liability of one creditor would not discharge the other. *Miller v. Beck*, 108-575.

**Measure of damages.** Where sale of the property at auction was made within a few weeks after the levy of the attachment, held that evidence as to what the property sold for, the number of bidders, and the offers made at the time the goods were exposed for sale was admissible. *Citizens Nat. Bank v. Converse*, 105-669.

An attaching creditor is not liable in damages in case of wrongful suing out of an attachment for the depreciation in value of real estate levied on which occurs while the attachment is in force. The mere issuing and levying of a writ of attachment on real estate cannot ordinarily cause it to depreciate in value. *Tisdale v. Major*, 106-1.

Mental suffering resulting from the wrongful and malicious suing out and levying of a writ of attachment does not afford ground for recovery of compensatory damages. *Ibid.*

A second attaching creditor who does not cause the seizure of the property (which remains in the custody of the officer under the prior attachment in pursuance of which it is sold) is not usually liable

for more than interest on the surplus of the proceeds over the amount of the first attachment debt. Liability in such case is usually no more than it would have been if the sheriff in possession under the first writ had been garnished for the surplus. *Emerson v. Converse*, 106-330.

If it appears by the finding of the jury that the attachment was properly issued, error in the charge of the court with reference to the damages to be assessed in the event that attachment was wrongful, will be error without prejudice. *Crowell v. McGoon*, 106-266.

It is error to instruct the jury with reference to damages by interruption or destruction of trade due to seizure of stock of goods under attachment where it appears that the goods levied on were not of such a nature as that their seizure could materially affect the trade or interrupt the business; and where it appears that by reason of such instruction the jury has made a

large allowance of exemplary damages the judgment on the verdict will be reversed. *Hooker v. Chittenden*, 106-321.

**Attorney's fees.** It is the defendant in the judgment who recovers the attorney's fees provided for in this section, and they are to be taxed in his favor as costs. The attorney cannot recover these fees in an independent suit. The defendant in the attachment has the right to satisfy the judgment for attorney's fees, and if the attorney collects such fees he is responsible to his client. *Schnitker v Schnitker*, 109-349.

**Costs.** It is not necessary in a counterclaim on a bond to ask recovery of costs. The costs of levying the writ and selling the property, which are unnecessary if the writ of attachment is wrongfully sued out, are to be taxed in such case, like the attorney's fees, by the court. *Ringin Stove Co. v. Bowers*, 109-175.

### SEC. 3888. Remedy for falsely suing out.

[For earlier annotations, see code, page 1548.—Ed.]

The assignee for the benefit of creditors, to whom the right of action on an attachment bond has been transferred, may inter-

vene in the original action, and set up a claim upon the bond. *Ringin Stove Co. v. Bowers*, 109-175.

### SEC. 3889. Writ to sheriff.

[For earlier annotations, see code, page 1548.—Ed.]

A writ of attachment from a district or superior court cannot be directed to a constable. *Freeman v. Lind*, 112-39.

### SEC. 3891. Property attached.

[For earlier annotations, see code, pages 1549-50.—Ed.]

By an attachment and levy the plaintiff obtains a right to the property levied upon paramount to that of an assignee in insolvency subsequently appointed. *State Bank v. McElroy*, 106-258.

An officer may amend his return so as to show the facts. *Foster v. Davenport*, 109-329.

### SEC. 3894. Corporation stock.

[For earlier annotations, see code, pages 1550-1.—Ed.]

Indorsements by the officer on stubs of certificates of stock are ineffectual to constitute a levy. *Croft v. Colfax E. L. & P. Co.*, 113-455.

Indorsement may be sufficient to constitute a levy, although it constitutes also notice to the debtor and occupant of real estate. *Ibid.*

A notice to the proper officer of the cor-

### SEC. 3895. Judgments—money—things in action.

[For earlier annotations, see code, page 1551.—Ed.]

Promissory notes are property, and are capable of manual delivery, and the proper method for attaching such notes is for the officer to take them into his actual

possession. Garnishment in such case is not the only method of effecting an attachment. *Nordyke v. Charlton*, 108-414.

### SEC. 3898. When property bound.

[For earlier annotations, see code, pages 1551-2.—Ed.]

Where an attachment was levied on all the goods, wares, merchandise, furniture and fixtures contained in a certain building

belonging to the defendant company, held, that such levy was sufficient to cover a cash register in use on the premises to-

gether with other furniture and fixtures. *National Cash Register Co. v. Broeksmit*, 103-271.

A levy on books of account does not create any lien on the indebtedness evidenced by such books. The debts due the owner of the books can be reached only by garnishment. *Cedar Rapids Pump Co. v. Miller*, 105-674.

The levy of a writ of attachment on the books of account of a debtor does not create

an inchoate lien on the debts included therein. *Smith v. Sioux City Nursery & Seed Co.*, 109-51.

There is a distinction between the return of a levy and the notice of a levy. When the property is in custody under a levy, a second attachment may be levied without overt act. The officer can treat the property as seized and make his levy accordingly. *German Savings Bank v. Oatmeal Co.*, 108-380.

### SEC. 3899. Real property—lien—entry on incumbrance book.

The creditor must show that his remedy at law would not be adequate before a pro-

ceeding in equity can be maintained. *Hill v. Denney*, 106-726.

### SEC. 3900. Notice—return.

[For earlier annotations, see code, page 1552.—Ed.]

Where a defendant has elected to counterclaim for damages on account of wrongful suing out of an attachment, he cannot be heard to say that there was no valid levy on account of want of notice. *Schoonover v. Osborne*, 108-453.

Notice to the person in possession, who is not the attachment defendant, is not for the benefit of the defendant but the party in possession, and if such party in possession has actual notice, and receipts for the property, he cannot object for want of the

notice required by statute. *Foster v. Davenport*, 109-329.

The notice provided for is not essential to the levy itself, but is for the purpose of enabling the property owner in apt time to guard any interest he may have in the property attached. Therefore held that where the levy was duly made it took priority over a mortgage executed before notice was served, the service of notice having been within a reasonable time. *Schoonover v. Osborne*, 111-140.

### SEC. 3905. Mortgaged personal property.

[For earlier annotations, see code, page 1553.—Ed.]

An attachment levied on chattel property covered by mortgage, such levy being made with a view to contest the validity of the mortgage, becomes an apparent lien upon all the property seized and not merely upon sufficient of said property to satisfy the

mortgage; and if the mortgage is found to be invalid the attachment is effectual. In such case a junior mortgagee has no preference as to any part of the property necessary to pay the attachment claims. *Geiershofer v. Nupuf*, 106-374.

### SEC. 3906. Indemnifying bond.

See notes under Code § 3991 in this Supplement.

### SEC. 3909. Delivery bond.

[For earlier annotations, see code, pages 1555-6.—Ed.]

The duty to deliver devolves upon the person giving the bond within twenty days after judgment is rendered against defendant in the original action. Even if there

is no order for condemnation of the attached property the action on the bond may be maintained. *Valley Bank v. Sacandoga Nat. Bank*, 109-43.

**SEC. 3912-a. Repeal—perishable property—when to be sold.** That section three thousand nine hundred and twelve (3912) of the code be repealed and the following enacted in lieu thereof:

When the sheriff thinks the property attached in danger of serious and immediate waste and decay, or when the keeping of the same will necessarily be attended with such expense as greatly to depreciate the amount of proceeds to be realized therefrom, or when the plaintiff makes affidavit to that effect, the sheriff may summon three persons having the qualifications of jurors to examine the same. The sheriff shall give the defendant, if within the county, three days' notice of such hearing, and he may appear before such jury and have a personal hearing. If they are of the opinion that the property requires soon to be disposed of, they shall specify in writing a day beyond which they do not deem it prudent that it should be kept in

the hands of the sheriff. If such day occurs before the trial day, he shall thereupon give the same notice as for sale of goods on execution, and for the same length of time, unless the condition of the property renders a more immediate sale necessary. The sale shall be made accordingly. If the defendant gives his written consent, such sale may be made without such finding. [C. '73, § 2999; R., § 3222; C. '51, § 1881.] [27 G. A., ch. 101, § 1.]

[For annotations, see code, page 1557—Ed.]

#### SEC. 3924. Judgment—satisfied from proceeds.

[For earlier annotations, see code, page 1559.—Ed.]

Where plaintiff moved for an order for sale of attached property or for the disposition of the proceeds of the same, which motion was denied, held that the ruling operated to discharge the attached property and included the rights of parties thereto under the judgment. *Second Nat. Bank v. Haerling*, 106-505.

#### SEC. 3926. Expenses for keeping.

[For earlier annotations, see code, pages 1559-60.—Ed.]

When the sheriff places the property in the hands of another for safe keeping, that other becomes the agent of the sheriff, and has no claim which can be taxed as costs. In such case the plaintiff in attachment is not jointly responsible with the sheriff to the person who keeps the property under the sheriff's direction for the expense incident to its care. There is no privity in such a case between the custodian and the plaintiff in attachment. *Hurd v. Ladner*, 110-263.

#### SEC. 3928. Intervention.

[For earlier annotations, see code, page 1560.—Ed.]

It would be otherwise if the property were taken into possession by the officer under a mortgage clause in a lease, and not in virtue of a writ of attachment. *Ibid.*

The intervenor who has given a delivery bond may contest recovery on the bond on the ground that the property did not belong to the attachment defendant, and the judgment in the principal action for a sale of the property will not be an adjudication in the intervention proceedings, but the intervention will not suspend the bar of limitations on the right to sue on the bond. *Valley Bank v. Shenandoah Nat. Bank*, 109-43.

An intervention under this section is in time, if applied for after the sale of the property and deposit of the proceeds with the clerk under order of the court, to abide further determination of the rights of the parties. *Petty v. Hayden*, 88 N. W., 339.

The intervenor cannot recover damages for the detention of the property. *Ohde v. Hoffman*, 90 N. W., 750.

#### SEC. 3929. Discharge on motion.

[For earlier annotations, see code, pages 1560-1.—Ed.]

The defendant may stand upon his motion to discharge the attachment on account of want of notice, but if he elects to counterclaim for damages on account of wrongful levy he cannot insist on failure to give notice of the levy. *Schoonover v. Osborne*, 108-453.

This section provides only for discharge of attachment merely on motion before the trial and not on application when there has been a prior application and a sale under special execution. *Clark v. Titt*, 113-113.

#### SEC. 3933. Liberal construction—amendments.

[For earlier annotations, see code, page 1563—Ed.]

Although a new ground of attachment may under some circumstances be properly set up in an amendment to the petition, yet, where such amendment was not filed until during the trial, held that the court did not abuse its discretion in striking such amendment from the files on motion. *Emerson v. Converse*, 106-330.

#### SEC. 3934. Sheriff—constables.

A writ of attachment, directed to a constable from a district or superior court, is not valid. *Freeman v. Lind*, 112-39.

## CHAPTER 2.

## OF GARNISHMENT.

**SECTION 3935. How effected—notice.**

[For earlier annotations, see code, pages 1563-8.—Ed.]

Debts due an attachment debtor can be reached only by garnishment, and not by levying the writ of attachment upon the books of account in which such debts are recorded. *Cedar Rapids Pump Co. v. Miller*, 105-674; *Smith v. Sioux City Nursery & Seed Co.*, 109-51.

A garnishee having notice of an assignment of a chose in action from the defendant, his creditor, to a third person, should set up that fact in defense, and not doing

so he cannot rely upon judgment in the garnishment proceeding as a defense against the assignee of the chose in action. *Seymour v. Aultman*, 109-297.

Garnishment of an assignee for the benefit of creditors, who has taken possession of notes and book accounts of the debtor before the assignment has become effectual, will take priority over such assignment. *Mills v. Miller*, 109-688.

**SEC. 3936. Of officer, judgment debtor, executor, municipal corporation.**

[For earlier annotations, see code, pages 1568-9.—Ed.]

The assignee of a judgment cannot complain as against an officer on account of a levy on and sale of a judgment subject to the assignment on an execution against the assignor. *Baker v. Mills*, 108-490.

An administrator cannot be garnished for a portion of the property of the estate to which he is entitled personally on a claim due by him. *Cassady v. Grimmelman*, 108-699.

The municipal corporation alone can plead its exemption from garnishment proceedings. *Tone v. Shankland*, 110-525.

An action under Code § 4087 to subject an equitable interest to execution may have the effect of a garnishment proceeding, but is not controlled by the provisions of this section with reference to the garnishment of a municipal corporation. *Ibid.*

**SEC. 3946. Judgment.**

[For earlier annotations, see code, pages 1574-6.—Ed.]

To charge the garnishee on his answer alone, no issue having been raised with reference thereto and no trial had, there must be in it a clear admission of a debt due to, or the possession of money or attachable property of the defendant. If the answer does not authorize a judgment under such a rule the plaintiff should take issue on the answer, so that a trial may be had and the rights of the parties determined. *Kerr v. Edgington*, 106-68.

Garnishment does not create a lien on the property in the hands of the garnishee, but gives the plaintiff a specific right over and above that of a mere general creditor, to the indebtedness or property, for the

payment of his claim. *Bowen v. Port Huron E. & T. Co.*, 109-255.

From the time of the service of notice, the garnishee is liable to plaintiff for the value of defendant's property in his hands subject to execution, and to the amount of all debts owing by him to the defendant and a judgment against the garnishee is *prima facie* a satisfaction *pro tanto* of plaintiff's claim against the defendant, and precludes subsequent proceedings by plaintiff against the defendant to that extent without a showing that plaintiff has obtained no valuable right by virtue of the garnishment, or has released the garnishee with the defendant's consent. *Ibid.*

**SEC. 3947. Notice to defendant.** Judgment against the garnishee shall not be entered until the principal defendant shall have had ten days' notice of the garnishment proceedings, to be served in the same manner as original notices. [18 G. A., ch. 58; C. '73, § 2975; R., § 3195; C. '51, § 1861.] [27 G. A., ch. 102, § 1.]

**SEC. 3948. Pleading by defendant—discharge of garnishee.** The defendant in the main action may, by a suitable pleading filed in the garnishment proceedings, set up facts showing that the debt or the property with which it is sought to charge the garnishee is exempt from execution, or for any other reason is not liable for plaintiff's claim, and if issue thereon be joined by the plaintiff, it shall be tried with the issues as to the garnishee's liability. If such debt or property, or any part thereof, is found to be thus

exempt or not liable, the garnishee shall be discharged as to that part which is exempt or not liable. [27 G. A., ch. 103, § 1.]

That the garnishee has never been served with notice, or that the *situs* of the debt is in another state, may be urged as grounds for discharge of the garnishee. The right to ask for a discharge under

this section cannot be tested by earlier decisions of the court under a statute not containing the provision as to discharge "for any other reason" than exemption from execution. *Greaves v. Posner*, 112-651.

### SEC. 3950. Negotiable paper.

It is a general rule that the indorsee for value before maturity of a negotiable promissory note takes it free from any previous garnishment of which he did not

have notice. but the attachment may be effected by levy upon the notes directly. *Nordyke v. Charlton*, 103-414.

## CHAPTER 3.

### OF EXECUTIONS.

#### SECTION 3954. Of judgments or orders—attachments for contempt.

[For earlier annotations, see code, page 1578.—Ed.]

Where a judgment has been rendered by the court, or a confession of judgment has been filed on which the clerk should have entered judgment, the failure of the clerk may be cured by an order of the

court for the entry of judgment *nunc pro tunc*, so as to support an execution which is issued in the meantime. *Doughty v Meek*, 105-16.

**SEC. 3958. Entries in another county—duplicate returns.** In case execution is issued to a county other than that in which judgment is rendered, and is levied upon real estate in such county, an entry thereof shall be made upon the incumbrance book of that county by the officer making it, showing the same particulars as are required in case of the attachment of real estate, which shall be bound from the time of such entry. And if real estate is sold under said execution said officer shall make return thereof in duplicate, one of which shall be appended to the execution and returned to the court from which it issued, the other with a copy of the execution to the district court of the county in which said real estate is situated, which shall be filed by the clerk who shall make entries thereof in the sale book in the same manner as if such judgment had been rendered and execution issued from said court. [C. '73, § 3031; R., § 3249.] [28 G. A., ch. 122, § 1.]

[For earlier annotations, see code, page 1579.—Ed.]

[The first note under this section in the Code is inaccurate in its reference to the section as it now stands. The cases cited

refer to the language of the corresponding section of Code of '73 which was different.]

#### SEC. 3964. Officer to receipt for—return.

[For earlier annotations, see code, page 1581.—Ed.]

The return of the execution does not affect the validity of garnishment proceed-

ings already commenced thereunder. *Dunham v. Bentley*, 103-136.

#### SEC. 3965. Indorsement by officer.

[For earlier annotations, see code, pages 1581-2.—Ed.]

Parol evidence is admissible to show facts not appearing by the officer's return. *Weaver v. Stacy*, 105-657.

**SEC. 3968. Levy—how made and indorsed.**

[For earlier annotations, see code, pages 1582-3.—Ed.]

A creditor who has secured a levy on personal property cannot subsequently release such levy and rely on other property to the prejudice of other creditors. *Valley Nat. Bank v. Des Moines Nat. Bank*, 90 N. W., 342.

**SEC. 3979. Levies upon mortgaged personal property—payment or deposit.**

[For earlier annotations, see code, pages 1587-8.—Ed.]

An attachment levied on chattel property covered by mortgage, such levy being made with a view of contesting the validity of the mortgage, becomes an apparent lien upon all the property seized and not merely upon sufficient of said property to satisfy the mortgage; and if the mortgage is found to be invalid the attachment is effectual. In such case a junior mortgagee has no preference as to any part of the property necessary to pay the attachment claim. *Geiershofer v. Nupuf*, 106-374.

The procedure here provided for by tendering the amount of the chattel mortgage is not exclusive. When it is claimed that chattel mortgages on property which is being levied on under execution are fraudulent, a judgment creditor may proceed by garnishment, when the property is in the hands of a third person, or by creditor's bill or other equitable proceedings, when the property is in the possession of the judgment defendant; and when he does

proceed by creditor's bill or other action in equity, he acquires such a right to or apparent lien upon the property as will support an application for the appointment of a receiver. *Hirsch v. Israel*, 106-498.

The statute provides for paying, or tendering payment, not for an assignment or purchase of the mortgage, but the attaching or execution creditor may purchase a prior mortgage, and then pay off the mortgage debt, and hold subject to his attachment or execution any surplus there may be. *Webster City Grocery Co. v. Losey*, 108-687.

The statutory provisions permitting levy on property covered by chattel mortgage under execution against the mortgagor do not require the mortgagee to take any steps for the purpose solely of shielding the mortgagor's property. It is only the mortgagee who can complain that the statutory provisions are not complied with. *Pratt v. Howard*, 109-504.

**SEC. 3988. Contest as to validity or amount.** If the right of the mortgagee to receive such or any sum is for any reason questioned by the levying creditor, he may, within ten days after levy, or after demand is made for a statement of the amount due as above provided, commence an action in equity or contest such right upon filing a bond in a penalty double the amount of such mortgage, or double the value of the property levied upon, conditioned either for the payment of any sum found due on said mortgage to the person entitled thereto, or for the value of the property levied upon; as the party ordering the levy may elect, with sureties to be approved by the clerk, and if such mortgagee is a non-resident or his residence is unknown, service may be made by publication as in other actions, but if such residence becomes known before final submission, the court may order personal service to be made. If commenced at law, the court may transfer the same to the equity side as in other cases. The court may appoint a receiver, and shall determine the amount due on the mortgage, the value of the property levied upon, and all other questions properly presented, and may continue and preserve or dismiss the lien of the levy, the costs to be taxed to the losing party as in other cases. If there are two or more mortgages, the creditor may admit the validity of one or more, and make the required deposit as to such, and contest the other, and where there are two or more such mortgages, each of which is questioned, a failure to establish the invalidity of all shall not defeat the rights of the levying creditor, but in such case the decree shall determine the priority of liens, and direct the order of payment out of the proceeds of the property which shall be sold under special execution to be awarded in said cause; but nothing in this chapter contained shall be construed to forbid or in any way affect the right of a creditor to contest in any other way the validity of any mortgage. [21 G. A., ch. 117, § 4.] [27 G. A., ch. 104, § 1.]

[For annotations, see code, page 1590.—Ed.]

**SEC. 3991. Indemnifying bond—notice of claim to property.**

[For earlier annotations, see code, pages 1590-2.—Ed.]

The provision that the claimant of the property levied on must give written notice of his claim thereto, has no application to a case where the defendant claims the property levied on as exempt. *Whitney v. Gammon*, 103-363.

The sworn notice of ownership must state the consideration for the chattel mortgage under which the plaintiff seeks to take the property from the sheriff in replevin. *McIver v. Davenport*, 110-740.

While the giving of an indemnifying bond may be a waiver of notice, a party who alleges the giving of notice cannot prove the fact by proving the execution of the

bond. Waivers must be pleaded. *Murray v. Thiessen*, 114-657.

Notice in a particular case held sufficient as to description of the property and of the party from whom plaintiff acquired it, and the consideration paid therefor. *Ibid.*

Where the sheriff acknowledged service on the back of the original, and received a copy, held that the service of the notice was sufficient. *Ibid.*

[The note of *Glover v. Narey*, 92-286, on page 1592 of the Code (2d column) is erroneous. The case has reference to the corresponding section of Code of '73 which was in different language.]

**SEC. 4008. Exemptions.**

[For earlier annotations, see code, pages 1596-8.—Ed.]

One who claims the property as exempt from execution has the burden of showing the facts constituting such exemption. *Hays v. Berry*, 104-455.

The owner of three teams of horses, any one of which might be claimed as exempt, has the privilege of determining which one he shall claim as exempt, and by ex-

ecuting a chattel mortgage on one of them he elects not to claim that one as exempt property. Therefore such mortgage is not required, under Code § 2906, to be joined in by the wife. *Grover v. Younie*, 110-446.

A bicycle habitually used by the debtor in earning his living is exempt. *Roberts v. Parker*, 90 N. W., 744.

**SEC. 4009. Pension money.**

[For earlier annotations, see code, pages 1598-9.—Ed.]

A party cannot be heard to say that the avails of a homestead are exempt because of his purpose to pay the purchase price with pension money, it not appearing that

any part of the pension money was invested in the homestead. *Lee v. Teeter*, 106-37.

**SEC. 4011. Personal earnings.**

[For earlier annotations, see code, pages 1599-1600.—Ed.]

There is no indication in this section of any intention to exclude from the time during which earnings shall be exempt

the period of time during which litigation to recover such earnings may be pending. *Chadwick v. Stout*, 112-167.

**SEC. 4017. Failure to claim exemption.**

[For earlier annotations, see code, page 1601.—Ed.]

While the owner of property cannot waive the exemption thereof by surrendering the same to the sheriff, or failing to object to its levy, the owner is not precluded from making a selection before the levy of execution, or even before the rendition of judgment, and held that where the owner of three teams, any one of which might be claimed as exempt, gave a chattel mortgage on one of them, he thereby elected not to claim that team as exempt, and

therefore the mortgage was valid, although the wife did not join therein. *Grover v. Younie*, 110-446.

[Change last note under this section in the code to read as follows.]

Notice by the debtor to the officer that the property was exempt from execution was not required by the provisions of Code of '73 to be under oath, nor signed by the debtor. *Glover v. Narey*, 92-286. But now see Code § 3991.

**SEC. 4019. Debts owing for labor preferred.**

[For earlier annotations, see code, page 1601.—Ed.]

The statute does not limit the rights of a laborer to those arising from labor performed in the betterment of property. *Goodenow v. Foster*, 108-508.

As to whether a creditor having a con-

tract lien upon property acquired prior to the time labor is performed in or upon it has the right to insist that the labor claims be paid out of other property, which is subject to such lien, and not covered by

the contract lien, *quaere. Hart v Nonpareil Printing & Pub. Co.*, 109-82.

The statute does not provide that laborers shall be creditors of a common debtor before being entitled to the preference here provided for. As between a mechanic's lien and the laborer's lien the laborer's is

preferred, and it is immaterial that the mechanic's lien antedates the laborer's claims. *Haw v. Burch*, 110-234.

The claims of laborers under this section have preference over mortgage liens. *In re Byrne*, 97 Fed., 762.

#### SEC. 4022. Priority.

In attachment proceedings by a landlord against his tenant a lien of the tenant's employe on the crops for wages is

superior to that of the landlord. *Stuart v. Twining*, 112-154.

**SEC. 4027. Penalty for selling without notice.** An officer selling without the notice prescribed in sections four thousand and twenty-three (4023), four thousand and twenty-four (4024), and four thousand and twenty-six (4026) of the code, shall forfeit one hundred dollars to the defendant in execution, in addition to the actual damages sustained by either party; but the validity of the sale is not thereby affected. [C. '73, § 3081; R., § 3312; C. '51, § 1907.] [28 G. A., ch. 123, § 1.]

[For annotations, see code, page 1603.—Ed.]

#### SEC. 4028. Time and manner of sale.

[For earlier annotations, see code, pages 1603-8.—Ed.]

One who is in possession of land claiming a title thereto may maintain an injunction to prevent the sale of such land under an execution against one having no interest therein. The plaintiff in such case is not required to make out a perfect title in himself. *Moore v. Kleppish*, 104-319.

Laches on the part of creditors in bringing action to set aside an execution sale

as fraudulent or irregular will bar their rights. *Hansen's Empire Fur Factory v. Teabout*, 104-360.

A judgment creditor may cause an execution to be issued and the interest of the judgment debtor to be sold before that interest has been judicially ascertained. *Sheppard v. Messenger*, 107-717.

#### SEC. 4036. Subjecting real estate of deceased judgment debtor.

[For earlier annotations, see code, page 1610.—Ed.]

An execution issued after the death of the judgment plaintiff is void unless there is an indorsement of the death of the plaintiff as required by statute. The failure of the defendant to complain for want of such indorsement will not be a waiver of the objection. *Dunham v Bentley*, 103-136.

On the death of the judgment debtor the execution creditor is required to have his right to an execution renewed, which can only be done in the court where the judgment was rendered. *Hansen's Empire Fur Factory v. Teabout*, 104-360.

Creditors who have filed their claims against the estate cannot bring action to set aside a conveyance by the deceased as fraudulent; such action must be brought by the administrator. *Ibid.*

A judgment creditor does not lose his lien by not filing his judgment as a claim for payment by the administrator. *Boyd v. Collins*, 70-296.

#### SEC. 4040. Mutual judgments—set off.

[For earlier annotations, see code, pages 1610-11.—Ed.]

Mutual judgments, executions from which are in the hands of the same officer, may be set off, the one against the other, ex-

cept as to costs. *Schnitker v. Schnitker*, 109-349.

#### SEC. 4045. Redemption—by debtor—appeal or stay.

[For earlier annotations, see code, pages 1613-15.—Ed.]

Where an execution for a partnership debt is levied on the real property of one partner, an agreement by another partner that the purchaser at execution sale shall immediately take possession of the premises and hold them during the period for redemption, is not binding on the partner

whose property is sold, in the absence of express or implied authority to make such contract. *Heins v. Tamblin*, 110-478.

Where the very object of the appeal is to secure a right of redemption, the taking of the appeal does not waive the right. *Kilmer v. Gallaher*, 88 N. W., 959.

**SEC. 4046. By creditors.**

[For earlier annotations, see code, pages 1615-17.—Ed.]

The provision for redeeming by one creditor from another has no application to a case where there is but one creditor. A person though holding different claims against the debtor cannot redeem from himself. *Stephens v. Mitchell*, 103-65.

A junior judgment creditor has no right to redeem after the expiration of the lien of his judgment. *Hansen's Empire Fur Factory v. Teabout*, 104-360.

A creditor to whom the real estate has

been conveyed by an absolute deed for the purpose of securing a debt, is not a vendee in such sense as to be allowed to make redemption during the last three months of the year succeeding the sale. *Robertson v. Moline-Milburn-Stoddard Co.*, 106-414.

If the debtor redeems before the period has expired during which creditors may redeem, their liens are not barred, but continue and may be enforced. *People's Sav. Bank v. McCarty*, 88 N. W., 1076.

**SEC. 4048. Senior creditor.**

One holding a valid certificate of tax sale superior to the claims of the execution creditor may be made a party defendant

in the proceeding to foreclose. *Browne v. Kiel*, 90 N. W., 624.

**SEC. 4051. Redemptions by holder of title—where made.** The terms of redemption, when made by the title holder, shall be the payment into the clerk's office of the amount of the certificate, and all sums paid by the holder thereof in effecting redemptions, added to the amount of his own lien, or the amount he has credited thereon, if less than the whole, with interest at contract rate on the certificate of sale from its date, and upon sums so paid by way of redemption from date of payment, and upon the amount credited on his own judgment from the time of said credit, in each case including costs. All redemptions made under the provisions of this chapter shall be made in the county where the sale is had. [26 G. A., ch. 65; C. '73, § 3106; R., § 3336; C. '51, § 1930.] [28 G. A., ch. 124, § 1.]

A creditor can only redeem by payment to the clerk, as provided in Code § 4056, and the acquisition of certificates of sales or

other liens does not amount to redemption. *Jack v. Cold*, 114-349.

**SEC. 4056. Credit on judgment.**

[For earlier annotations, see code, pages 1619-20.—Ed.]

In case of redemption by a creditor within nine months from the date of the sale no affidavit stating the amount still unpaid and due on the redemptioner's claim, under the provisions of § 3118 of Code of '73 was required. That section had relation to redemptions made after the expiration of nine months. *Fry v. Warfield-Howell-Watt Co.*, 105-559.

Under the provisions of the Code of '51, held that there was no requirement as to any other notice of the amount for which the creditor was willing to hold the land than the entry in the sale book, and therefore no warrant for the substitution of any other notice, though it might seem better than that fixed. *Meredith v. Peterson*, 108-551.

Under this section as it now stands redemption can only be made by payment to the clerk, and a lien holder purchasing certificates of sale or acquiring other liens does not thereby make redemption except by such payment as is here contemplated. *Jack v. Cold*, 114-349.

Under the statutes as they existed before the adoption of the present Code, a creditor who had by acquiring liens become a redemptioner at the expiration of the six months during which the debtor had the exclusive right to redeem, thereby effected redemption, and held that the effect of this redemption was not destroyed by the subsequent adoption of the Code. *Ibid.*

**SEC. 4063. Recording of deed.**

[For earlier annotations, see code, page 1622.—Ed.]

Although the deed is not placed on record until more than sixty days after the expiration of the full time for redemption,

one who is not a subsequent purchaser in good faith for value cannot complain. *Hannan v. Seidentopf*, 113-658.

## CHAPTER 4.

## OF PROCEEDINGS AUXILIARY TO EXECUTION.

**SECTION 4087. Equitable proceedings.**

[For earlier annotations, see code, page 1627.—Ed.]

These sections of the Code with reference to an equitable levy are applicable to a case where the defendant has possession of the property, as well as to a case where it is in possession of a third person, and a receiver may be appointed in such case. Even if the sections are not applicable in such a case a creditor has a right to bring a suit in equity, independent of statute, for the purpose of subjecting property to the payment of his judgment, and such a suit would be a sufficient basis for the appointment of a receiver. *Hirsch v. Israel*, 106-498.

The provisions of this and following sections as to subjecting equitable interests in real estate are declaratory of the common law and should be construed with

reference to the established rules thereof. Therefore, held that a creditor seeking relief must first have recovered judgment which would be a lien on real estate. *Peterson v. Gittings*, 107-306.

As garnishment cannot be maintained against an administrator to subject property of deceased in his hands, in which he is entitled to share personally, to the payment of a personal judgment against him, equitable proceedings to subject the property to the payment of such judgment may be maintained. *Cassady v. Grimmelman*, 108-695.

A municipal corporation may be made defendant in such proceedings. *Tone v. Shankland*, 110-525.

**SEC. 4089. Lien created.**

[For earlier annotations, see code, page 1627.—Ed.]

[The rule announced in the last annotation to this section in the Code, citing *Ware v. Purdy*, 60 N. W., 526, was changed on rehearing of said case. See same case, 95-667.—Ed.]

Under this section it is not necessary to serve notice of such proceedings against the judgment debtor, where the creditor had actual notice of the filing of the petition. *Shumaker v. Davidson*, 87 N. W., 441.

## TITLE XX.

### OF PROCEDURE TO REVERSE, VACATE OR MODIFY JUDGMENTS

#### CHAPTER 1.

#### OF PROCEEDINGS TO REVERSE, VACATE OR MODIFY JUDGMENTS IN THE TRIAL COURTS.

#### SECTION 4091. Judgment vacated or modified—grounds.

[For earlier annotations, see code, pages 1628-31.—Ed.]

In general. Under these sections a proceeding to vacate a judgment because of irregularity in obtaining it must be by motion made before the second day of the next succeeding term. (See Code § 4093.) *Priestman v. Priestman*, 103-320.

In a proceeding to annul a judgment the parties to the judgment should be made parties to the proceeding. *Day v. Goodwin*, 104-374; *Fulliam v. Drake*, 105-615.

Reasonable diligence must be alleged and proved in order to obtain a new trial on petition, and if the ground is newly discovered evidence the allegations of the petition should show the facts constituting reasonable diligence, but a general allegation of diligence will be sufficient as against a demurrer. If the defendant desires more specific statement of the diligence used he should move therefor. *Scott v. Hawk*, 105-467.

A modification of a judgment, secured as the result of proceedings under this section, will not defeat an appeal already taken from the judgment as first rendered. *Culbertson v. Salinger*, 111-447.

An appeal from an order for a new trial made under the provisions of this and the following sections is not triable *de novo*, but on assignments of error, and if there be any conflict in the evidence, or in the inferences fairly deducible therefrom, the supreme court will assume such a state of facts, reasonably consistent with the evidence, as will support the conclusion reached. *Sitzer v. Fenzloff*, 112-491.

The matter of granting a new trial under this section is left largely to the sound discretion of the trial court, and unless an abuse of such discretion is shown its finding will not be disturbed on appeal. *Bank of Stratton v. Dixon*, 112-621.

A judgment entered on written stipulation of the parties cannot be set aside under this section on account of unavoidable casualty and misfortune. *Mains v. Des Moines Nat. Bank*, 113-395.

It is questionable whether equity will grant relief from a judgment on any

grounds excepting those enumerated in this section, although it might, upon a proper showing, entertain an application after the expiration of the year within which, by the terms of Code § 4094, proceedings at law must be commenced. *Ibid.*

The issues presented by a petition under this section should be tried as those in an ordinary action, and not on affidavit. *Engels v. Kiene*, 88 N. W., 331.

A motion to correct a decree already entered and made at the same term does not come within the provisions of this and the following sections. *McConnell v. Avey*, 90 N. W., 604.

And further see notes to Code § 244 in this Supplement.

The provisions of this and the following sections are not recognized in the federal courts. *Manning v. German Ins. Co.*, 107-Fed., 52.

The causes for a new trial recognized in this section are in general of the nature of those errors which could have been corrected by the use of a writ of error *coram vobis*. *Ibid.*

**Grounds: Fraud.** A motion to vacate a judgment without charging fraud or illegality in obtaining it cannot be made under this section. *Manning v. Nelson*, 107-34.

Under the evidence in a particular case held that the facts did not show fraud in procurement of the original judgment such as to require the granting of a new trial. *McCormick v. McCormick*, 109-700.

Where judgment is entered on default against a party who has been induced to refrain from making defense on the assurance that judgment was sought only as against his co-defendants, he may have relief in equity, even after the expiration of the year. *Beck v. Suckett*, 111-339.

**Proceedings against infant or insane person.** A judgment against an infant without defense by a guardian is clearly erroneous, and that fact may be made the ground for granting a new trial under this section. *Wise v. Schloesser*, 111-16.

A person is of unsound mind, within the provisions of this subdivision, when so weak and infirm mentally as not to be capable of exercising the judgment necessarily required in the management of his ordinary affairs. *Garretson v. Hubbard*, 110-7.

The right of an insane person to have a judgment against him set aside on petition within a year after regaining mental capacity is an absolute right which no one can waive for him, nor can such right be affected or abridged by decree or judicial proceedings. *Pollock v. Milburn*, 112-528.

A second application for new trial will not be granted when the condition of the party is practically the same as when the first application was denied. *McBride v. McClintock*, 108-227.

**Casualty and misfortune.** A new trial will not be granted on the ground of casualty and misfortune in a case where judgment was rendered by default against a corporation, where it appears that the secretary of the corporation, upon whom service was made, was not charged with the management of its affairs, and did not take steps to have a defense made to the

action. *Sioux City Vin. Mfg Co. v. Boddy*, 108-538.

Where judgment was rendered against a married woman on substituted service made by leaving a copy with her husband at his place of residence during a time when she was not actually residing with him, although her abandonment was temporary only, and it appeared that on her return he failed to notify her of the fact of such service, held that there was such casualty and misfortune as to warrant the granting of a new trial. *Galvin v. Dailey*, 109-332.

A client is only chargeable with the negligence of his attorney when that negligence may be imputed to him, that is, when by the exercise of care on his part he could have avoided the consequences of such negligence. The client has a right to rely on the attorney to inform him as to the time of the trial and as to anything required for the purpose of making a defense, and if, by reason of the negligence of the attorney in failing to give such information, and without fault on his part, he is prevented from making defense, there is such unavoidable casualty or misfortune as to entitle him to a new trial. *Peterson v. Koch*, 110-19.

#### SEC. 4092. New trial after term.

[For earlier annotations, see code, pages 1631-3.—Ed.]

A petition in the nature of a bill of review asking a modification of an injunction previously granted does not stand denied

by operation of law, as would a petition to reverse, vacate or modify the judgment. *Denby v. Fie*, 106-299.

#### SEC. 4093. Motion to correct mistake or irregularity.

[For earlier annotations, see code, page 1633.—Ed.]

Under this section the remedy is by motion filed within a year; otherwise relief is to be sought by petition in equity. *Manning v. Nelson*, 107-34.

Motion to retax attorney's fee allowed in a judgment on foreclosure of a mortgage does not come within the provisions of this section. *Perry v. Kaspar*, 113-268.

#### SEC. 4094. Petition.

[For earlier annotations, see code, pages 1633-4.—Ed.]

Where the application for a new trial is made after the time allowed for granting new trials on motion it should be by petition, but if no objection on that ground is made the form of application will be immaterial. *State v. Stevenson*, 104-50.

Proceedings for correction of a judgment on grounds enumerated under this section, are to be by petition, and the proceedings are to be commenced as those in any other original action. *Perry v. Kaspar*, 113-268.

#### SEC. 4095. Proceedings.

[For earlier annotations, see code, page 1634.—Ed.]

The trial of a petition for new trial is to be as an ordinary action, whether the original case is at law or in equity, unless

the parties in some way assent to a trial in equity. *Markley v. Owen*, 102-492; *Scott v. Hawk*, 105-467.

#### SEC. 4096. Valid defense.

[For earlier annotations, see code, pages 1634-5.—Ed.]

The proper inquiry on an application to set aside a judgment is not whether defendant had a technical defense to plaintiff's action in that form, but rather whether he could show facts reasonably indicating

that he was not indebted to the plaintiff. The purpose of the statute is to avoid opening up a judgment unless it appears to be in the interests of justice to do so. *Bank of Stratton v. Dixon*, 105-148.

## CHAPTER 2.

## OF PROCEDURE IN THE SUPREME COURT.

## SECTION 4100. Appellate jurisdiction over judgments.

[For earlier annotations, see code, pages 1635-8.—Ed.]

**Final judgment.** Where expressly or by implication the relief asked by plaintiff is denied in the judgment such judgment is against the plaintiff so that he has a right of appeal. *Floete v. Brown*, 104-154.

Where a judgment provided that it should not go into effect until five days after its date, and notice of appeal was served before the expiration of this period, held that the appeal was properly taken, as the stay, if it had any effect, only served to suspend enforcement, and did not suspend the judgment itself. *Meredith v. Peterson*, 108-551.

The action of the court in improperly overruling a motion to dismiss an appeal from a justice of the peace on the ground that there is no competent surety to the appeal bond is a final judgment with reference to the jurisdiction of the court to entertain such appeal, and therefore the order overruling the motion is appealable. *Hudson v. Smith*, 111-411.

A modification of a final judgment, secured by appellee after the appeal is taken, does not operate to merge the judgment from which the appeal is taken so as to

defeat such appeal. *Culbertson v. Salinger*, 111-447.

**Waiver.** Performance of a party of a judgment which would not be affected by the appeal will not constitute waiver of the appeal. *Mountain v. Low*, 107-403.

Motion for judgment *non obstante veredicto* does not waive the right to complain of errors on appeal. *Cullison v. Lindsay*, 108-124.

The facts in a particular case held not sufficient to show waiver of the appeal by performance of the judgment. *Schoonover v. Osborne*, 108-453.

Voluntary payment of a judgment waives the right of appeal, and payment in redemption will be voluntary if the party by asking a restraining order might have saved his rights, pending the appeal, with out making redemption. *Manning v. Poling*, 114-20.

The fact that the jurisdiction of the court to enter an order has been questioned by certiorari does not operate as a waiver of the right to appeal from such order. *Porter v. Butterfield*, 89 N. W., 199.

## SEC. 4101. Appeals from orders.

[For earlier annotations, see code, pages 1639-41.—Ed.]

No appeal lies from an order sustaining an application for the inspection of books and papers and directing the production of such documents. *Devier v. Economic L. Assn.*, 106-682.

Action of the trial court in sustaining a motion to direct a verdict is an order from which an appeal may be taken. *Clark v. Van Loon*, 108-250.

An appeal lies from a ruling refusing to set aside an assignment of a cause for trial by jury, and setting it down for trial to the court. *In re Bradley*, 108-476.

Where the court sustained a motion striking out an answer as immaterial or redundant, matter which constituted a defense, held that such ruling materially affected the final decision of the case, and that an appeal therefrom was properly taken. *Mast v. Wells* 110-128.

Under this section the action of the trial judge, under the provisions of Code § 254 as to ordering a transcript of the shorthand notes in a criminal case at the expense of the county, is subject to review. *State v. Wright*, 111-621.

An appeal may be taken from an order overruling a motion for a new trial. *Boyce v. Timpe*, 89 N. W., 83.

Appeals may be taken from final orders

in special actions affecting substantial rights therein. *Porter v. Butterfield*, 89 N. W., 199.

The sustaining of a motion to set aside default is not such an intermediate order as that an appeal may be prosecuted therefrom. *Odell v. Coquolette*, 103-435.

A party is not obliged to appeal directly from a ruling on a motion, but may proceed to judgment, and present his exceptions to intermediate orders on an appeal from the final result. *Parker v. Des Moines L. Assn.*, 108-117.

Where application for leave to amend after reversal and remand for a new trial is sustained, there is no right to appeal from the order as affecting a substantial right, but such a ruling is appealable as an intermediate order involving the merits or materially affecting the final decision, if the amendment offered introduces a new and distinct cause of action. *Allen v. Dav-enport*, 87 N. W., 743.

Where, after the making of an order the situation of the parties is materially changed by the presentation of new issues, the fact that the parties proceed to trial on the merits will not preclude an appeal from the order thus made. *Stewart v. Pierce*, 89 N. W., 234.

**SEC. 4106. Motion for new trial.**

[For earlier annotations, see code, pages 1643-4.—Ed.]

The fact that an exception to an instruction in a motion for a new trial is too general will not avail to defeat an exception properly taken at the time the instructions were given. *State v. Smith*, 107-487.

A motion for a new trial is not necessary to secure a review in the supreme court of exceptions that have otherwise been prop-

erly preserved. *Clement v. Drybread*, 108-701.

Errors in rulings on the admission of evidence are not waived by a failure to urge them in a motion for a new trial on other grounds. *Stewart v. Equitable Mut. L. Assn.*, 110-528.

**SEC. 4109. Process.**

The supreme court has authority to enter orders to preserve the status with respect to property in litigation until the determination of the appeal. *Manning v. Poling*, 114-20.

And further as to restraining orders, see notes in this supplement to Code § 4128.

**SEC. 4110. Time for appealing—amount in controversy—certificate.**

[For earlier annotations, see code, pages 1645-51.—Ed.]

**Time for taking.** In a law action, in which nothing but a claim for money is involved, there is no final disposition of the case until the amount is ascertained and fixed. *Baird v. Omaha & C. B. R. & B. Co.*, 111-627.

Where the clerk enters judgment on the verdict of the jury without express direction, the time for taking appeal runs from the date of such entry, although the attorneys subsequently ask the court to approve a different form of judgment entry. *Burlington v. Fear*, 89 N. W., 1074.

**Amount in controversy.** The action of the trial court in withdrawing a claim from the jury will not affect the amount in controversy. *Rand v. Binder*, 75 N. W., 505.

To defeat the jurisdiction it must appear from the pleadings that the case is one in which the amount in controversy does not exceed one hundred dollars. Where no amount is shown the appellant jurisdiction exists. *First Nat. Bank v. Bourdelais*, 109-497.

Where the appeal involved only the validity of certain acts of township trustees as fence viewers, determining an indefinite liability as to the maintenance of a partition fence, held that it did not appear that the amount in controversy

was less than one hundred dollars, and that the appeal would lie. *Miles v. Tomlinson*, 110-322.

The provisions of this section, preventing a party by remittitur from reducing the amount in controversy for the purpose of appeal to the supreme court, have no application to appeals from justices of the peace, under Code § 4547. *Rust v. Olson*, 113-571.

**Certificate.** A certificate must set out the very point to be determined, without requiring the examination of the record and the proceedings. *Sloss v. Bailey*, 104-696.

While this section dispenses with many things previously required in the certificate of appeal where the amount in controversy is less than one hundred dollars, it does not dispense with the assignment of errors and other matters essential to a proper presentation of the appeal to the supreme court. *Kistner v. Conery*, 109-439.

Although the certificate attempts to recite the question to be decided, nevertheless if it in effect allows an appeal it is sufficient. *Percival v. Strathman*, 112-747.

The certificate is required to be made during the trial term. *Pollock v. Milburn*, 112-528.

**SEC. 4111. Appeal by co-parties.**

[For earlier annotations, see code, pages 1651-2.—Ed.]

Service of notice of appeal on a co-party is not required to give the supreme court jurisdiction, where the interests of such co-party are wholly separate from those of appellant, and would not be affected by the decision of the appeal. *Mason v. Des Moines*, 108-658.

A party having no interest which can be affected by the appeal need not be served with notice thereof. *Ward v. Walker*, 111-611.

In partition suits, where there are several parties plaintiff and defendant, and one of these appeals, notice of appeal must be served on the co-parties. But failure to give such notice is not jurisdictional and the supreme court can consider such questions in the case as do not affect the rights or interests of the other parties. *Lippold v. Lippold*, 112-134.

Notice on co-parties not interested in the question to be decided on appeal is not

jurisdictional, but no question can be determined on such appeal involving the in-

terests of such parties. *Calyton v. Sievertsen*, 87 N. W., 412.

### SEC. 4113. Part of judgment or order.

An appeal from a portion of a decree in no way affects the portion not appealed

from. *State v. Fidelity L. & T. Co.*, 113-439.

### SEC. 4114. Notice.

[For earlier annotations, see code, pages 1653-5.—Ed.]

**A second notice of appeal served while the case is pending in the supreme court under a previous notice is of no effect.** *Newbury v. Getchell & Martin Lumber, etc., Co.*, 106-140.

and whom the record shows to be still an attorney in the case, it is sufficient to give the supreme court jurisdiction of the appeal. *American Emigrant Co. v. Long*, 105-194.

**Sufficiency.** A notice of appeal, advising the opposite party that appellant appeals from the "rulings and judgment" of the district court, rendered on certain specified dates, is sufficient to admit a review of the final judgment, although the date given is erroneous by reason of mistake. *Parker v. Des Moines L. Assn.*, 108-117.

**Service on clerk.** Unless service on the clerk is shown the appeal will be dismissed. *Lemley v. Rea*, 74 N. W., 748.

Service on the deputy clerk is sufficient. *Cullison v. Lindsay*, 108-124.

**Signature.** A notice of appeal not signed by the appellant or attorneys for him is without validity and confers no jurisdiction, even though service of such notice is accepted by attorneys for appellee. *State Sav. Bank v. Ratcliffe*, 112-662.

**Securing clerk's fees.** Under § 3179 of the Code of '73, held that the provision relating to security for clerk's fees was for the benefit of that officer and might be waived by him. *Varnum v. Winslow*, 106-287.

Where the appellee in an action against a railroad company gave the title of the case, including the full name of the railroad company, held that the fact that the attorneys for the railroad company signing the notice of appeal used the initials only of the railroad company in connection with their signature would not defeat the appeal. *Rickel v. Chicago, R. I. & P. R. Co.*, 112-148.

**Party not served.** Where a party to the record is not served with notice of appeal, the appeal cannot be prosecuted as to him, and no relief based on the reversal of the judgment against him can be granted in the appellate court. *Baxter v. Rollins*, 110-310.

An attorney may act for his client in giving notice of appeal, and a notice signed by appellant's attorney for and on behalf of his client is sufficient. *Hogueland v. Arts*, 113-634.

Attorneys who have become interested in the judgment by agreeing to present the case upon appeal for a contingent fee are not parties in such sense as to be entitled to notice of appeal. *Harrison v. Palo Alto County*, 104-383.

**Effect as to jurisdiction of lower court.** After appeal from a final judgment the district court has no further right to proceed in the case. *Stillman v. Rosenberg*, 111-369.

**Service on attorney.** Where a notice of appeal is in fact served upon an attorney who has appeared in the case below

The trial court has jurisdiction to correct the record, even after an appeal has been taken to the supreme court. *Porter v. Eutterfeld*, 89 N. W., 199.

### SEC. 4116. Term of submission.

[For earlier annotations, see code, page 1655.—Ed.]

The first term to which the appeal can be taken in the absence of an agreement must necessarily begin thirty days or more

after the notice of appeal has been served. *Hanson v. Hammell*, 107-171.

### SEC. 4118. Abstracts.

[For earlier annotations, see code, pages 1656-64.—Ed.]

**Form.** Where the abstract was not accompanied by an index and there was no reference in plaintiff's argument showing where in the abstract the testimony or ruling referred to might be found, held, that the submission should be set aside and the cause continued for the perfection of the abstract. *State v. Abeggan*, 103-50.

decree may be affirmed where the appellant does not present a proper abstract. It is improper to embody in the abstract the entire evidence, or a greater portion of it by questions and answers copied from the transcript, thus including a mass of irrelevant matter. *Phillips v. Crips*, 108-605.

A disregard of the rule as to printing abstracts, consisting in the presentation of

Under Rule 21 of the Supreme Court, the

the evidence by question and answer, as contained in the transcript of the reporter's notes, is a ground for affirmance. *Cressey v. Lochnes*, 109-454.

Brevity in an abstract is not only a commendable quality, so long as all material matters are presented, but it is expressly enjoined by Rules 21 and 22 of the Supreme Court. *Howard v. Pratt*, 110-533.

Where an abstract in an equity case was made up of the pleadings set out in full, including long exhibits not material to the determination of the case on appeal, and the testimony by questions and answers, held that it was not such as to require the supreme court to determine the case *de novo*. *Thoma v. Hecker*, 90 N. W., 598.

It is not necessary that the names of appellant's counsel be affixed at the end of the abstract where it appears to have been made in the usual way and the names of counsel in the case appear on the first page. *Alston v. Alston*, 114-29.

Should contain what. Jurisdictional facts, such as service of notice of appeal, must appear in the abstract. *Clayton v. Sievertsen*, 87 N. W., 412.

The statement in the abstract that appellant "served due, legal and timely notice of appeal" is sufficient, without setting out the formal notice. *Oxford State Bank v. Holscher*, 88 N. W., 360.

Where the abstract states that "notice of appeal was issued" on defendant and on the clerk, etc., it does not sufficiently show notice so as to give the court jurisdiction of the appeal. *Oskaloosa Cigar Co. v. Iowa Cent. R. Co.*, 89 N. W., 1065.

Where the abstract contains a statement that judgment was duly entered, which statement is undenied, appellee cannot complain that the record entry is not set out in full. *Hawkeye Ins. Co. v. Huston*, 89 N. W., 29.

Time for filing. An additional abstract will not be stricken from the files because not filed within the time fixed by Rule 22 of the Supreme Court, if it does not appear that the submission of the case was delayed by the filing of such additional abstract, nor that prejudice has resulted from it. *Clark v. Ellsworth*, 104-442; *Frank v. Levi*, 110-267; *Sanders v. O'Callaghan*, 111-574; *Tucker v. Carlson*, 113-449.

An abstract or amendment thereto filed after the submission of the cause and without express permission of court will not be considered and will be stricken from the files on motion. *Watson v. Burroughs*, 104-745.

An abstract may be amended even after the time for filing by the addition of assignments of error, and if the appellee has had reasonable opportunity to argue such assignments he cannot have the amendment stricken out on motion because not filed in time. *Salvador v. Feeley*, 105-478.

Where an amendment to an abstract is filed within a reasonable time after the

defect therein is called to the attention of the appellant, an amendment to cure the defect will not be stricken from the files. *Steckel v. Standley*, 107-694.

Costs. Where the appellee without any occasion for doing so made an abstract of the evidence in the case, the abstract presented by the appellant being proper and sufficient for all purposes, held, that on motion in the supreme court the costs of the additional abstract should be taxed to appellee. *McWhirter v. Crawford*, 104-550.

An additional abstract presenting only an acknowledgment of a mortgage about which there was no question and which was therefore wholly unnecessary, held taxable to appellee. *Fox v. Gray*, 105-433.

Where an amendment to an abstract consisted of many pages of evidence by question and answer, unnecessarily so presented, the costs thereof may be taxed to appellant. *Deering v. Beatty*, 107-701.

All the evidence. To enable the appellate court to review the trial court's ruling directing a verdict, the abstract must contain all the material evidence. *Kitzman v. Kitzman*, 88 N. W., 341.

Under Supreme Court Rule 22 a judgment will be affirmed where appellee denies that the abstract contains all the material evidence and the transcript shows that it does not contain all the testimony, so that the court cannot determine whether or not the abstract does contain the evidence material for consideration in the determination of the appeal. *Ibid*.

Where the appellee has set out in an additional abstract portions of the evidence which he avers to be a part of the record, he cannot raise the question whether the evidence was properly preserved in an equity case. *Sarvis v. Caster*, 89 N. W., 84.

A certificate of the reporter to the effect that the abstract is a true rendering into long hand of his shorthand notes and contains all the testimony offered or introduced will not entitle the appellant to a trial *de novo*. The reporter has nothing to do with the preparation of the abstract and his certificate thereto is of no effect. *Gibbs v. Oskaloosa*, 103-734.

Presumed to contain record. Under this section the abstract is presumed to contain all the evidence, in the absence of any denial, correction or statement therein to the contrary, with sufficient completeness to enable the court to pass on every question raised. It is not necessary in an equity case in order to secure trial *de novo* that the abstract contain the statement that it is a full and correct abstract of the record or that it contains all the evidence introduced or offered. *McGillivray v. Case*, 107-17.

The printed abstract will be presumed to contain the record, unless denied or corrected by a subsequent abstract. *Van Rees v. Witzenburg*, 112-30.

It is not necessary to include in the ab-

stract evidence relating to an issue not involved in the appeal. *Ibid.*

Under this section, embodied in Rule 22 of the Supreme Court, the presumption is that the steps necessary to make the evidence of record have been properly taken. *Kirchman v. Standard Coal Co.*, 112-668.

A general allegation in appellee's abstract that appellant's abstract, together with matter presented by the appellee, does not show the entire evidence, no longer makes it necessary for the court to go to the transcript. *Ibid.*

It is no longer necessary in order to secure a trial *de novo* that appellant formally allege in his abstract that it is an abstract of all the evidence, and that the evidence was preserved in the proper manner. *Alston v. Alston*, 114-29.

Under Rule 22 of the Supreme Court a general denial will not raise an issue or present a dispute with reference to the correctness of appellant's abstract. *Palmer v. Clark*, 114-558.

All the evidence to be considered on the appeal must be included in the abstracts. The office of certification of the record or of a transcript is solely to settle disputes developed in printing the record, save when an original paper or document is to be inspected. *Ibid.*

Corrections made by the appellee in his additional abstract will be taken as true where appellant's denial thereof is not confessed nor sustained by certification of the record. *Mosgrove v. Zimbleman Coal Co.*, 110-169.

Where the correctness of appellant's abstract was not denied, and it appeared from the record as presented that the amount of damages allowed to the appellant as plaintiff was too small, held, that al-

though the instructions did not appear in the abstract, it would still be presumed that the court had before it all of the record necessary to enable it to pass on the question of the inadequacy of the damages allowed. *King v. Hart*, 110-618.

**Denial.** Under Rule 22 of the Supreme Court a general denial that appellant's abstract contains all the evidence is of no effect. *Bradley v. Iowa Cent. R. Co.*, 111-562.

Where appellant has not had the record certified, appellee's denial as to the correctness of any specific matters set up in the abstract will be deemed true. *Rule v. McGregor*, 88 N. W., 814.

Where it does not appear that the shorthand notes have been extended into long-hand, and such transcript filed in the district court, and the attorney for the appellee denies that the evidence has been properly preserved and made of record, the appellant is required to furnish a transcript from the clerk establishing the fact. Without that the court cannot consider any question depending upon the evidence adduced. *State v. Owens*, 109-143.

Where it does not appear that appellant's abstract contains all the evidence and appellee files an additional abstract setting out other evidence which it is claimed was omitted by appellant, and does not deny that the abstracts together contain all the evidence it will be presumed that all the evidence is before the court. *First Nat. Bank v. Robinson*, 105-463.

**Opinion of lower court.** It is not improper to include in the abstract, or an additional abstract, the written opinion of the lower court in the case. *Richardson v. Carlton*, 109-515.

## SEC. 4120. Dismissal or affirmance.

[For earlier annotations, see code, pages 1664-5.—Ed.]

While the court may extend the time for filing the abstract upon application, such application must be made before the time given by statute for filing abstracts has expired. In other words, neither the supreme court nor a judge thereof can grant to the appellant the right which has once been lost to file an abstract; but while that right exists the time may be extended by the court or by one of its judges. Where there is no waiver or estoppel the appellee has the right to insist upon a dismissal or affirmance when he brings himself within the terms of the statute, even though the abstract be already filed when the motion is made. In this respect the statute is mandatory. Section 28 of the Rules of the Supreme Court does not give to the appellant the right to delay filing of abstract until thirty days before the second term after the appeal is taken, but merely provides that if not filed thirty days before such term and further time is not given,

the appellee may have the appeal dismissed or the judgment or order from which it was taken, affirmed by pursuing the method pointed out. The requirement as to time of filing abstract being statutory cannot be modified by the rules of court. *Newbury v. Getchell & Martin Lumber, etc., Co.*, 106-140.

Notice of the application to extend the time for filing an abstract should be served on the adverse party or his attorney. *Ibid.*

Failure of appellant to file his abstract within the time required, without an extension having been secured before the expiration of the statutory period, cannot be remedied by the entry of an order *nunc pro tunc* granting an extension of time. *Ibid.*

The time for filing an abstract cannot be extended by serving a second notice of appeal. *Ibid.*

The time within which appellant's abstract is required to be filed under Rule 28

of the Supreme Court cannot be extended by an amendment attempting to bring before the court on appeal rulings and orders made subsequent to the decree appealed from. *Ruby v. Downs*, 113-574.

The requirement that the abstract shall be filed by the time here specified is mandatory. Application for extension of time must be made before the period allowed has expired and upon notice to adverse party. *Hanson v. Hammill*, 107-171.

The first term contemplated is that to which the appeal might have been taken by serving the proper notice thirty days before its first day and the second term is that immediately following. *Ibid.*

Under the facts of a particular case held that there was no sufficient excuse shown for failing to file an abstract within the time required by the rules, and that there had been no act of appellant, in reliance on the failure of appellee to object, which would prevent the court from affirming on a motion of appellee for failure of appellant to file his abstract within the time required. *Brown v. Farmers L & T. Co.*, 109-440.

Where appellee has made no objection on account of delay of appellant in filing his abstract until appellant has prepared and filed his argument, the appeal will not be dismissed on appellee's motion on account of the delay in the filing of the abstract. *McDermott v. Hacker*, 109-239.

In some cases there may be a material difference between the effect of dismissing the appeal and affirming the order or judgment from which the appeal is taken, but the appellee does not have an absolute right to elect which remedy he will have. It is proper for him to ask in the alternative for one relief or the other, and when that is done the court grants that form of relief which seems to be best calculated to do justice. *Newbury v. Getchell & Martin Lumber, etc., Co.*, 106-140.

The office of certification of the record or of a transcript is solely to settle disputes developed in printing the record. All the evidence to be considered on the appeal must be included in the abstracts. *Palmer v. Clark*, 114-558.

#### SEC. 4122. Transcript—when required.

[For earlier annotations, see code, pages 1665-6.—Ed.]

Where the clerk certifies the transcript of the record, the fact that his fees therefor have not been paid or secured will be deemed to have been waived and it cannot be objected on that ground that the appeal has not been perfected. *Harrison v. Palo Alto County*, 104-283.

The provisions of this section, authorizing the translation of the original notes of the shorthand reporter when certified to by him to be sent up in lieu of a transcript was intended simply to avoid the expense of transcribing the translation of

the notes of the evidence, and does not by implication or otherwise repeal the requirement of Code § 3652, that all the evidence taken in equitable cases shall be certified by the judge within the time allowed for appeal. *Stoan v. Davis*, 105-97.

The provision of the Rules of the Supreme Court for waiving or modifying such rules so far as they relate to the abstract, preparation and argument of causes, has no application to a case where the record is not authenticated as required by statute. *Ibid.*

#### SEC. 4123. What sent up.

[For earlier annotations, see code, pages 1666-70.—Ed.]

The office of the certificate of the clerk of the lower court is only to identify the record and in an equity case there must

also be a certificate of the trial judge to the evidence in order to secure trial *de novo*. *Bauernfiend v. Jonas*, 104-57.

#### SEC. 4127. Perfecting record.

[For earlier annotations, see code, pages 1670-1.—Ed.]

The trial court may, after the taking of an appeal and filing of notice of appeal, correct the record so as to show that at the time service of notice of appeal was ac-

cepted by appellee it was not signed by appellant's attorneys. *State Sav. Bank v. Ratchue*, 112-662.

#### SEC. 4128. Stay of proceedings—supersedeas bond.

[For earlier annotations, see code, page 1672.—Ed.]

Where the party has secured possession by service of the right of possession before the giving of an appeal bond he is not affected by the subsequent filing of the bond. *Hyatt v. Clever*, 104-338.

An appeal from a judgment against a county or other municipal corporation does

not operate as a stay of proceedings thereon without the filing of a supersedeas bond. Such municipal corporations are not contemplated by the statutory provision that no security shall be required in actions maintained by the state. *Harrison v. Stebins*, 104-462.

A supersedeas bond on an appeal from a decree granting an injunction will not cover damages resulting from a violation of the injunction. Such violation is to be reached by proceedings for contempt. *Cole v. Edwards*, 104-373.

The judgment appealed from remains in full force for all purposes, subject only to determination on appeal. Therefore a judgment from which an appeal has been taken may be relied on as a prior adjudication in another action involving the same right or title. *Watson v. Richardson*, 110-698.

A defendant who has appealed from a judgment in plaintiff's favor without giving a supersedeas bond is not entitled, on

petition alleging his inability to file such bond, to have plaintiff give bond to refund in case of reversal, the judgment otherwise to be stayed. *Watson v. Niles*, 112-655.

A supersedeas bond will not continue in force a temporary writ of injunction. The continuance of the injunction pending the determination of the appeal can only be secured by a restraining order in the supreme court. *Manning v. Poling*, 114-20.

An order of a judge of the Supreme Court restraining the enforcement of an execution pending appeal is a valid exercise of authority, although not expressly provided for by statute. *Norris v. Tripp*, 111-115.

### SEC. 4136. Assignment of errors.

[For earlier annotations, see code, pages 1673-6.—Ed.]

**When necessary.** An assignment of errors is essential on the presentation of an appeal upon certificate of the judge in a case where the amount in controversy is less than one hundred dollars. *Kistner v. Conery*, 109-439.

An equity case cannot be tried on assignments of errors, except that such assignments are necessary to enable the court to consider rulings on motions or demurrers in such cases. *Smith v. Wellslager*, 105-140.

No assignment of errors is required where the case is tried below as in equity. *Clearfield Bank v. Olin*, 112-476.

In an equity case appellant cannot make assignments of error in rulings on the admission or rejection of evidence, and have them considered as in an action at law. *Foy v. Armstrong*, 113-629; *Spinney v. Halliday*, 88 N. W., 939.

**What sufficient.** An assignment is sufficient which mentions the particular ruling objected to in the introduction of evidence, as well as the name of the witness, and the page of the abstract where the ruling is found. *Manatt v. Scott*, 106-203.

An assignment of error in the sustaining of a general demurrer to an equitable petition is sufficiently specific. *Williams v. Williams*, 88 N. W., 1057.

Assignment of error in sustaining or overruling a demurrer or a motion based on several grounds is not sufficient. *Sisson v. Kaper*, 105-599; *Phelps D. & P. Co. v. Samson*, 113-145; *Jamison v. Jamison*, 113-720; *Brewster v. Chicago & N. W. R. Co.*, 114-144; *Shoemaker v. Turner*, 90 N. W., 709.

Where several grounds are stated in a motion for a new trial, errors should be separately assigned as to the ruling with reference to each particular ground, so far as it is desired to have such rulings reviewed on appeal. *Huss v. Chicago G. W. R. Co.*, 113-343.

An assignment that "the court erred in its rulings upon the evidence, to which plaintiff excepted, as shown in this ab-

stract," is not sufficient. Nor is an assignment sufficient that the court erred in sustaining a motion based on several distinct grounds. Nor is it sufficient to assign error in "submitting the case to the jury." *Dairy v. Iowa Cent. R. Co.*, 113-716.

Assignments that the court erred "in rendering judgment for plaintiffs and against defendants upon the evidence adduced" and "in rendering judgment for the defendants" held not sufficient. *Creager v. Johnson*, 114-249.

An assignment of error covering instructions given and refused must point out specifically the error relied upon in the court's ruling. *Fitch v. Mason City & C. L. T. Co.*, 89 N. W., 33.

An assignment that the court erred in giving of its own motion certain instructions described by numbers, "to the giving of each and every one of which instructions the defendants then and there duly excepted," is not sufficient. *Faivre v. Manderscheid*, 90 N. W., 76.

An assignment which does not clearly and specifically indicate the very error complained of, but refers to a motion for new trial for information as to the grounds relied upon, which motion sets up different grounds, is not sufficiently specific. *Nordine v. Rosengreen*, 89 N. W., 103.

Assignments in particular cases held not sufficient. *Geiser Mfg. Co. v. Krogman*, 111-503; *Field v. Eastern B. & L. Assn.*, 90 N. W., 717.

**Amendment.** The assignment of errors may be cured by amendment. *Roberts v. Parker*, 90 N. W., 744.

An amended assignment of errors which does not delay the submission of the cause will not be stricken from the files because not made within the time allowed for filing the assignment of errors. *Salvador v. Feeley*, 105-478.

**In argument.** An assignment made in connection with appellant's argument may be sufficient to bring up the ruling for review. *Hogueland v. Arts*, 113-634.

**SEC. 4139. Arguments—submission—decision.**

[For earlier annotations, see code, pages 1677-1703.—Ed.]

**Failure to argue.** Errors not argued will not be considered. *Thompson v. Brown*, 106-367.

Questions raised by an assignment of error, but which are not argued, will not be considered, nor will the mere statement of a point entitle it to consideration. *Ottumwa v. Hodge*, 112-130.

A case will not be reversed for failure to present a defense to the jury when the appellant does not consider it substantial enough to discuss it on appeal. *Bradley v. Iowa Cent. R. Co.*, 111-562.

Assignments of error argued for the first time in a reply will be disregarded. *Fink v. Des Moines*, 89 N. W., 28; *Schoonover v. Osborne*, 90 N. W., 844.

The argument of plaintiff in a particular case held not such as to require the court to consider the case *de novo*. *Thoma v. Hecker*, 90 N. W., 598.

**Time for filing argument.** Under Rule 39 of the supreme court, if appellant's argument is not filed by the time required, and no sufficient excuse is shown for the delay, the appellee may have the case submitted as of the day of default, and as thus submitted without argument for appellant, the supreme court will affirm the case. *Harrington v. Hubinger*, 112-90.

Additional abstracts and arguments will not be stricken from the files because not filed in time when the submission of the cause has not been thereby delayed. *Ft. Madison v. Moore*, 109-476.

**New objections not considered.** An objection urged for the first time in the supreme court will not be considered on appeal. *Paine v. Lettsville*, 103-481; *State v. Olds*, 106-110; *Talbot v. First Nat. Bank*, 106-361; *Hugh v. Gearen*, 110-240; *Easton v. Somerville*, 111-164.

The district court must be given an opportunity to pass upon all questions before they can be considered in the supreme court on appeal. *In re Moore's Estate*, 103-474.

The objection that in an action against a city for injuries due to defects in a street, not brought within six months from the happening of the injury, written notice of the claim is not alleged or shown, is one which must be made in the lower court and cannot be considered for the first time on appeal. *Reed v. Muscatine*, 104-183.

Where the trial is to the court and the controlling question is as to the sufficiency of the evidence the supreme court may consider that question on appeal although it has not been directly asked to give a new trial on account of the insufficiency of the evidence. *Alpha-Check-Rower Co. v. Bradley*, 105-537.

A party will not be heard in the supreme court until his grievance has been presented to and acted upon by the trial court. *Cloud v. Malvin*, 75 N. W., 645.

The very objection which is urged in the supreme court should have been called to the attention of the trial court to enable the plaintiff to take advantage of it on appeal. *Sisson v. Kaper*, 105-599.

The provisions of 25 G. A., ch. 96, to the effect that a pleading shall not be held sufficient on account of the failure to demur thereto (see Code § 3564) has no application to proceedings on appeal and an objection which might have been raised by demurrer in the trial court cannot for the first time be urged in the supreme court. *Reed v. Muscatine*, 104-183; *Boyd v. Watson*, 101-214; *Wood v. Dunham*, 105-701; *Lacy v. Kossuth County*, 106-16.

Errors relating to the introduction of evidence not based on any ruling will not be considered. *Philbrick v. University Place*, 106-352.

A party must except to special findings with which he is not content even though judgment is rendered in his favor; otherwise on appeal such special findings will be conclusive. *Aldrich v. Paine*, 106-461.

The insufficiency of a petition to entitle plaintiff to the relief granted cannot be raised for the first time on appeal. *Preston v. Peterson*, 107-244.

A party will not be heard in an appellate court until his grievance has been presented to and acted upon by the trial court. *Cloud v. Malvin*, 108-52.

A question not raised and presented to the lower court in a timely and proper manner cannot be presented to the supreme court on appeal. *Smith v. McQuiston*, 108-363.

It is not proper to amend a pleading on appeal in the supreme court. *Ottumwa Brick & Cons. Co. v. Ainley*, 109-386.

The objection that the action is prematurely brought cannot be made for the first time on appeal. *Petty v. Mutual F. Ins. Co.*, 111-359.

The objection that the petition does not state a cause of action cannot be made for the first time in the supreme court. *Iowa Stone Co. v. Crissman*, 112-122.

If the objection relied on in the appellate court has actually been made in the trial court, appellant is not precluded from giving a reason in support thereof which was not assigned on the trial. *Cooper v. Cedar Rapids*, 112-267.

A question which might have been raised in the lower court by demurrer or answer, but which has not been so raised, will not be considered on appeal, even in a case triable *de novo*. *Schoening v. Schwenk*, 112-733.

A motion to retax costs is not necessary in order to secure a review of the judgment of the lower court as to taxation of attorney's fees made in the judgment itself. *Ainley v. American Mut. F. Ins. Co.*, 113-709.

The supreme court will not on a trial *de novo* determine a question not raised by the pleadings in the trial court. *Zion Church v. Parker*, 114-1.

Defect of parties not objected to on the trial cannot be first raised on appeal. *West Side Lumber Co. v. Hathaway*, 89 N. W., 35.

A party cannot complain for the first time on appeal that after his pleading was held defective the court proceeded without allowing him until noon of the next day in which to amend or plead over. *Chase v. Wright*, 90 N. W., 357.

A motion for a new trial filed too late or a motion for a judgment notwithstanding verdict, will not be deemed a waiver of errors which might have been presented without such motion. *Hooker v. Chittenden*, 106-321.

The rule that the supreme court will not on appeal consider an objection not raised in the lower court is not applicable in criminal cases. *State v. Nine*, 105-131.

What the record must show. Where the evidence is not all before the supreme court is cannot determine whether the trial court did or did not err in sustaining a motion for a verdict. *Dungan v. Iowa Cent. R. Co.*, 96-161.

But in such case it is only necessary that the record show all the evidence received. It is not necessary that all the evidence offered be shown. *Goring v. Fitzgerald*, 105-507.

Where a question related to a certain exhibit and was objected to as incompetent and immaterial, held, that a ruling sustaining the objection could not be reviewed in the absence from the record of the exhibit referred to. *Leifheit v. Schlitz Brewing Co.*, 106-451.

Where a complaint is made of the rejection of testimony, it must appear, to warrant reversal, that the rejected testimony would have been relevant and competent. *Gibson v. Burlington, C. R. & N. R. Co.*, 107-596.

Where the appellant's abstract states that upon the issue raised by the pleadings the evidence was conflicting, and this statement is not denied, the court may consider errors assigned in giving instructions with reference to such evidence. *Jerolman v. Chicago G. W. R. Co.*, 108-177.

In an action at law, where the appellate court is not asked to determine the sufficiency of the evidence to sustain a verdict or judgment, it is proper to state in the abstract what the evidence submitted tended to prove. *Shumway v. Burlington*, 108-424.

If the errors assigned are based entirely on rulings on the admissibility of evidence, or its effect, it is sufficient if the evidence offered and received, together with the objections, rulings and exceptions, is duly certified and filed. *State v. Welsh*, 109-19.

To pass upon the validity of a directed verdict the record need only show the evi-

dence on the part of the person against whom the verdict is directed. *Scott v. St. Louis, K. & N. W. R. Co.*, 112-54.

Presumption in favor of trial court. Where a motion for a new trial is sustained generally, the action of the court will not be reversed on appeal if any one of the grounds stated in support of the motion is sufficient to warrant the ruling. *Moore v. Horton*, 105-376.

Where a motion for a new trial is sustained on one ground thereof, but is not expressly overruled as to the other grounds, the action of the trial court will not be reversed unless it appears that the motion should not have been sustained on any of the grounds stated therein. *Holmon v. Omaha & C. B. R. Co.*, 110-485.

Where a motion for new trial is sustained on some of the grounds set up and expressly overruled upon all others, the appellee not having appealed, the court cannot consider whether the motion might not properly have been sustained on other grounds than those specified by the trial court. A different question would be presented if the court, instead of overruling the motion on all other grounds but those sustained, had made no ruling as to such grounds. *Loomis v. Des Moines News Co.*, 110-515.

Where the court overrules a motion it will be presumed that the ruling was on a ground which is tenable, although another ground which is not tenable is also urged. *German Sav. Bank v. Cady*, 114-228.

Where it does not affirmatively appear that the court overruled some of the grounds of a motion for new trial there should not be a reversal because other grounds alleged are not in themselves sufficient to sustain the action of the court in granting a new trial. To establish error in such a case it must affirmatively appear that a new trial should not have been granted on any of the grounds stated. *Boyd v. Western Union Tel. Co.*, 90 N. W., 711.

New reasons. If there is any ground appearing in the record on which the trial court's ruling can be sustained it will be affirmed, though such a ruling may have in fact been based on some other ground. *Cotton v. Southwestern Mut. L. Assn.*, 87 N. W., 675.

Where a demurrer is sustained to a petition in an action for mandamus, the judgment will be affirmed if on the whole the petition fails to state a cause of action, even though the reasons indicated for the ruling by the trial court are not sufficient. *Vincent v. Ellis*, 88 N. W., 836.

Error without prejudice. One party is not prejudiced by a ruling that the other must prove more than the law requires to be proved under the issues. *Read v. State Ins. Co.*, 103-307.

The sustaining of a motion to make a petition more specific will be error without

prejudice where the petition, having been amended by the addition of new matter in response to such motion, is held insufficient on demurrer on the ground that it does not state facts sufficient to show cause of action. *Sigmond v. Bebbler*, 104-431.

The admission of incompetent evidence properly objected to cannot be deemed without prejudice because other evidence of the same character was admitted without objection. *Metropolitan Nat. Bank v. Commercial State Bank*, 104-682.

Error in instructions as to the measure of damages for wrongful suing out of an attachment will be without prejudice if the jury finds that the attachment was rightfully sued out. *Crowell v. McGoon*, 106-266.

Error in exclusion of cumulative evidence which could add nothing to the weight of the evidence already given will be deemed to be without prejudice. *Owen v. Christensen*, 106-394.

Where the verdict is in accordance with the interpretation which the court should have given to a written instrument, the action of the court in leaving the interpretation to the jury will be error without prejudice. *Hasbrouck v. Western U. Tel. Co.*, 107-160.

Where under the evidence and instructions there could be no dispute as to the amount of recovery, held that error in refusing to strike out items of plaintiff's claim, as to which final recovery was not allowed, was error without prejudice. *Gwinn v. King*, 107-207.

Error in refusing to transfer an action from the equity to the law docket will be error without prejudice where the issues would in any event be triable without a jury. *McCormick Har. Mach. Co. v. Markert*, 107-340.

Error in overruling a challenge for cause will not be deemed prejudicial where it does not appear in the record that the juror could not have been dismissed peremptorily. *Haggard v. Andrew*, 107-417.

Error in rejecting evidence relating to damages is without prejudice where the jury finds no cause of action. *Rosenberger v. Marsh*, 108-47.

The supreme court will not reverse for failure to submit a question to the jury, where no other result could have been properly reached had the question been submitted. *Haggard v. Independent Sch. Dist.*, 113-486.

Error in rejecting testimony will be without prejudice where the fact sought to be established is fully shown by the testimony of other witnesses. *State v. McPherson*, 114-492.

Prejudice presumed. When error appears prejudice will be presumed until the contrary affirmatively appears. *Ford v. Chicago, R. I. & P. R. Co.*, 106-85.

Contradictory and conflicting instructions are almost uniformly held to be erroneous

except in cases where the court can say there was no prejudice. *Ibid.*

Without an appeal or an assignment of error, appellee may protect a judgment in his favor, if entitled thereto on the face of the record, by showing from the record that the errors of which appellant complains were without prejudice. *Voorhees v. Arnold*, 108-77.

Prejudice presumed. Where an instruction given is erroneous it will be presumed to be prejudicial and to have been the ground of the verdict unless it affirmatively appears that the verdict was based on some other ground. *Strever v. Chicago & N. W. R. Co.*, 106-137.

From error in the giving of an instruction prejudice is presumed, which must be overcome by the record in order to show that the error was without prejudice. *Loughran v. Des Moines St. R. Co.*, 107-639.

Absence of judge from the court room and beyond hearing of the proceedings when not shown affirmatively to have been without prejudice is in itself error alone sufficient to warrant reversal of judgment. *State v. Carnagy*, 106-483.

But by affirmative consent to such absence error therein will be waived, even in a criminal case, unless prejudice appears. *State v. Hammer*, 89 N. W., 1083.

Where the character of the answers expected in response to questions asked is evident, the appellant, complaining of a ruling sustaining objections to such questions, is entitled to the presumption that the evidence, if received, would have been favorable to him. *Swanson v. Allen*, 108-419.

Where the object for which the question is asked is not apparent, but it is sought thereby to establish collateral facts, the materiality of which is to be afterwards shown, counsel asking the question must state what he expects to prove and in what way the facts sought to be elicited will become material, otherwise the sustaining of an objection to his question will be error without prejudice. But where the question calls for evidence, the materiality and competency of which is plainly apparent, an error in sustaining an objection to the question will be presumed to be prejudicial. *Quinlan v. Chicago, R. I. & P. R. Co.*, 113-89.

Slight error. Where plaintiff was erroneously allowed to introduce evidence of an element of damage for which recovery should not have been permitted, but the damage thus proven was of an inconsiderable amount, and no request to have that amount remitted from the verdict was made in the lower court, held that the judgment would not be interfered with on appeal. *Frohs v. Dubuque*, 109-219.

Error of a few cents, in computing the amount of recovery will not be ground for

reversal. *Perin v. Cathcart*, 89 N. W., 12.

**Nominal damages.** A judgment will not be reversed for failure to award nominal damages when it does not appear that appellant was entitled to more. *Lippert v. Lippert*, 110-550.

In the absence of evidence as to the extent of substantial damages failure to assess nominal damages is not a ground of reversal. *Ryce v. Whitley*, 87 N. W., 694.

**Error cured.** Error in overruling a motion to exclude evidence will be error without prejudice where at the end of the examination all evidence of that character is excluded and the jury cautioned to disregard it. *State v. Baker*, 106-99.

While it is not proper to base an argument on facts not shown to have existed, error in doing so is cured by prompt action of the court in requiring the withdrawal of such remarks. *Mackerall v. Omaha & St. L. R. Co.*, 111-547.

Error in submitting a ground of recovery of which there is no evidence may be cured by filing an offer to remit that for which verdict should not have been rendered. *Bowsher v. Chicago, B. & Q. R. Co.*, 113-16.

**New trial for insufficient evidence.** The verdict of a jury will not be disturbed by the appellate court on the ground that it is not sustained by the testimony unless it is so manifestly against the weight of evidence as to show it to have been the result of passion or prejudice. *Inghram v. National Union*, 103-395.

**Order granting new trial.** The supreme court does not interfere with the action of the trial court when a new trial is granted except in a clear case of abuse of discretion. *Brammer v. Wabash R. Co.*, 75 N. W., 668.

A motion for new trial for want of evidence is addressed to the sound discretion of the trial court, and its action thereon will not be interfered with unless it is manifest that such discretion has been improperly exercised, and this rule is especially applicable where the motion is sustained. *Holman v. Omaha & C. B. R. Co.*, 110-485.

The supreme court is reluctant to interfere with an order granting a new trial. A large discretion in such matters is lodged in the trial court, and its exercise of discretion will be interfered with only in a clear case of abuse. *Loomis v. Des Moines News Co.*, 110-515.

It requires a clear case to justify setting aside the ruling of a trial court granting a new trial. *Mackintosh v. Locke*, 112-252.

**Abstract questions.** The supreme court will not entertain an appeal for the purpose of deciding merely abstract questions. *Berry v. Des Moines*, 87 N. W., 747.

**Decision binding on second appeal.** The rule of law announced by the supreme

court on one appeal is to be followed by the lower court on the second trial of the case and will be recognized as the law of the case on a second appeal. *McFall v. Iowa Cent. R. Co.*, 104-47.

It would be manifestly unjust to reverse the lower court for following the express direction of the supreme court given on the former appeal in the same case. The holding of the court on one appeal is the law of the case for a subsequent trial of the same case in the lower court. *Henderson v. Western Union Tel. Co.*, 114-415.

The opinion in one appeal will be followed, right or wrong, in the determination of subsequent appeals in the same case. *Cowles v. Chicago, R. I. & P. R. Co.*, 88 N. W., 1072.

**What triable de novo.** Where the action was properly one at law but has been treated in the lower court as if in equity, it will be so treated on appeal. *Harrison v. Palo Alto County*, 104-383.

A proceeding for admeasurement of dower is triable ordinarily upon assignment of error and not *de novo*. *In re Estate of Lund*, 107-264.

Exceptions to rulings on the admission and exclusion of evidence even though assigned as error will not be considered on a trial of an equity case *de novo*. *Varnum v. Winslow*, 106-287.

**Finding of lower court.** Even in an equity case triable *de novo* it is not improper to give some weight to the fact that the trial court had before it the witnesses, and that it is in a better position than the appellate court to determine the credibility and effect of their testimony. *Berry v. Berry*, 88 N. W., 1075.

In view of the fact that the trial court has heard the evidence as given, and has had opportunities to observe the effect of the evidence, it should exercise greater freedom in granting new trials for insufficiency of the evidence than will be exercised by the supreme court on appeal, and the supreme court will not interfere with the discretion of the lower court in such cases unless it appears that there has been a clear case of abuse of legal discretion. *Brooks v. Brotherhood of American Yeomen*, 88 N. W., 1089.

**What abstract must show in trials de novo.** Where the abstract of the appellant does not show that the record is such that the case can be tried *de novo* and the case is submitted in that form and appellee insists that the appeal should be dismissed, the appellant cannot subsequently cure the defects in his abstract and secure a trial *de novo* by an amendment. *Watson v. Burroughs*, 104-745.

The fact that the abstract does not appear to contain all the evidence may justify an affirmance of the judgment of the lower court but not a dismissal of the appeal. *First Nat. Bank v. Robinson*, 105-463.

Failure of an abstract to show that it contains evidence offered but not received, as well as that offered and introduced, may be cured by amendment when the defect is pointed out. *Steckel v. Standley*, 107-694.

After the evidence has on appeal been stricken from the record because not properly preserved and the case has been submitted on the part of appellee, appellant is not entitled to have the evidence re-instated and the case considered as though such evi-

dence was in the record. *Citizens Bank v. Johnson*, 107-365.

**Remanding case.** Even in an equity case triable *de novo* the supreme court may remand the case to the lower court for further proceedings to ascertain the amount for which decree shall be rendered. *Haggarty v. Brower*, 105-395.

**Opinion.** The language in an opinion must be limited by the subject to which it is applied. *Geiershofer v. Nupuf*, 106-374.

**SEC. 4142. Costs taxed.** The supreme court must provide by rule for taxing as costs all printing authorized upon the trial of appeals. The court shall also tax the costs of any translation of the shorthand notes filed as provided in this chapter, and also any translation of the shorthand notes which has been made of record in the court below, upon the certificate of the clerk of such court as to the amount of such costs. [26 G. A., ch. 64.] [27 G. A., ch. 105, § 1.]

[For annotations, see code, page 1703.—Ed.]

**SEC. 4145. Restitution of property.**

[For earlier annotations, see code, page 1704.—Ed.]

The voluntary payment of money to redeem property, sold under a decree which is afterwards reversed, will not entitle the successful party to recover the money thus paid. *Weaver v. Stacy*, 105-657.

The amount paid in satisfaction of execution under a judgment may be recovered on a reversal of the judgment. *Manning v. Poling*, 114-20.

The restoration required by this section is not limited to property sold, but if money of the judgment defendant is obtained by reason of such judgment, as through a redemption of the property sold, he is entitled to its return upon reversal. *Schoonover v. Osborne*, 90 N. W., 844.

**SEC. 4146. Title not affected.**

[For earlier annotations, see code, page 1704.—Ed.]

This section has no application where the judgment does not affect the present condition, possession or title of real property acquired by the party under the pro-

ceeding appealed from. *Central Trust Co. v. Hubinger*, 87 Fed., 3; *Hubinger v. Central Trust Co.*, 94 Fed., 788.

**SEC. 4150. Death of party—continuance.**

[For earlier annotations, see code, page 1706.—Ed.]

While the substitution of proper parties may be made when asked, the death of a party does not prevent the determination of the appeal, and it is not necessary that

there be a substitution where death occurs between the submission and the decision of the appeal. *Williams v. Williams*, 88 N. W., 1057.

**SEC. 4151. Dismissal of appeal.**

[For earlier annotations, see code, page 1706.—Ed.]

Where the controversy involved the right to the possession of a farm, which right if it ever existed had terminated, held that

the appeal should be dismissed. *Moller v. Gottsch*, 107-238.

## CHAPTER 3.

### OF CERTIORARI.

**SECTION 4154. When writ may issue.**

[For earlier annotations, see code, pages 1707-9.—Ed.]

When a want of power is urged in a municipal corporation to vacate a street,

a court of equity may pass upon the question, but when the power is conceded and

the manner of its exercise is sought to be controlled, the remedy is at law through proceedings by certiorari. *McLachlan v. Gray*, 105-259.

One who has no individual interest in a proceeding in a court cannot prosecute an action by certiorari to review such proceeding. *Wilson v. Remley*, 106-583.

The writ of certiorari cannot be properly granted when the error complained of can be fully and speedily corrected by appeal. *Oyster v. Bank*, 107-39.

A citizen and taxpayer as such is not entitled to maintain certiorari to test the validity of a city ordinance, where it does not appear that he has any right affected by the ordinance not common to all residents, citizens and taxpayers. *Collins v. Keokuk*, 108-28.

#### SEC. 4162. Limitation.

[For earlier annotations, see code, page 1711.—Ed.]

Where the motion to set aside an order and judgment of the district court is still pending in that court undisposed of, the supreme court will not entertain a proceeding by certiorari to review its action. *Lloyd v. Spurrier*, 103-744.

An action of certiorari to determine the validity of a special assessment may be brought within one year after the levy of the assessment, although the resolution ordering the improvement for which the

Certiorari is the proper remedy by which to test the legality of the proceedings of a board of supervisors in changing the location of a courthouse. *Way v. Fox*, 109-340.

The writ of certiorari is never used to correct mere error, but only to test the jurisdiction of an inferior tribunal. *Butterfield v. Treichler*, 113-328.

If the court improperly proceeds after a dismissal, there being no counterclaim properly pleaded, the error of the court may be corrected by certiorari. *Bardes v. Hutchinson*, 113-610.

Certiorari and appeal are not necessarily inconsistent remedies, and the fact that the party brings certiorari to test the jurisdiction of the court to enter an order does not constitute a waiver of the right to appeal from such order. *Porter v. Butterfield*, 89 N. W., 199.

assessment is made was passed more than a year before the bringing of the action. *Polk v. McCartney*, 104-567.

In a proceeding to determine the liability of a land owner to construct a partition fence, held that any claim on his part that the land was a public common was one which should have been interposed by proceedings under certiorari within one year. *Miles v. Tomlinson*, 110-322.

## TITLE XXI.

### OF PROCEDURE IN PARTICULAR CASES.

#### CHAPTER 1.

##### OF ACTIONS OF REPLEVIN.

##### SECTION 4163. Where brought—petition.

[For earlier annotations, see code, pages 1712-16.—Ed.]

It is not required under the present Code, as it was under the Code of '51, that the petition shall allege that the defendant wrongfully detains the property in controversy. *Kennedy v. Roberts*, 105-521.

The requirements of the statute as to what the petition shall contain are not jurisdictional. *Ibid.*

The allegation in an action for replevin of a note that it was "of no value except as a matter of evidence to the plaintiff and for that purpose and that only is of the value of five hundred dollars," held to be sufficient allegation of the actual or apparent value as required by statute. *Ibid.*

Even though plaintiff was not entitled to the possession of the property when the action was commenced, he may have the right to have his interest in the property determined. *Harvard v. Davenport*, 105-592.

Under allegation of absolute and unqualified ownership, plaintiff may prove ownership subject to chattel mortgages. *Ibid.*

In an action of replevin wherein no writ for possession is asked or issued and no bond given, the plaintiff may be allowed by amendment to convert his action into one for damages for wrongful conversion of the property. *France v. Orvis*, 75 N. W., 660.

If, after plaintiff has brought an action

in replevin, it develops that he can only obtain the relief to which he is entitled in chancery and that the issues are properly triable there, he may amend his petition and have the action transferred to the equity calendar. *Cox Shoe Mfg. Co. v. Adams*, 105-402.

Plaintiff must recover on the strength of his own title, and any evidence which tends to show that he did not obtain title to the property or to some part thereof, is admissible. *Gevers v. Farmer*, 109-468.

Where plaintiff alleges that he is the absolute and unqualified owner of the property he must prove such allegation as made, and proof of his right to hold it in trust or under a mortgage will not support his action. *Ibid.*

Plaintiff must recover on the strength of his own title, and if he seeks to recover possession of property levied on under writ of execution, on the ground that it is exempt from execution, he must establish that fact. *Hillman v. Brigham*, 110-220.

An action of replevin is to determine the present possession of the property. *Hilman v. Brigham*, 90 N. W., 491.

A landlord who has a lien upon a tenant's personal property but whose right to possession thereof has not accrued cannot recover possession by replevin. *Ibid.*

##### SEC. 4164. Ordinary proceedings—no joinder or counter-claim.

[For earlier annotations, see code, page 1716 —Ed.]

In an action of replevin to get possession of property under a chattel mortgage, defendant may by way of cross action ask an injunction restraining the proceeding under the mortgage as to any property not subject thereto. *Brody v. Chittenden*, 106-340.

Defendant is not allowed in an action of

replevin to introduce by way of counter-claim any general demand he may have for damages for trespass committed by animals, possession of which plaintiff seeks to recover in the action. *Holaman v. Marsh*, 90 N. W., 82.

Section applied. *Wedgewood v. Pare*, 112-514.

##### SEC. 4166. New parties.

[For earlier annotations, see code, page 1717.—Ed.]

Where an intervenor seeks to establish his right to possession of the property taken by the plaintiff, and accepts a judgment for its return, he cannot afterwards

sue in damages on the replevin bond for injury to the property. *Newton v. Round*, 109-286.

**SEC. 4167. Bond.**

[For earlier annotations, see code, pages 1717-18.—Ed.]

Any error in the ruling of the court as to the sufficiency of the replevin bond will be immaterial where the plaintiff establishes his right to recover. *Kennedy v. Roberts*, 105-521.

Where it is asked to have a temporary

injunction dissolved as to all the property covered thereby it will be a proper reason for refusing relief that as to some of the property the injunction was properly granted. *Brody v. Chittenden*, 106-340.

**SEC. 4176. Judgment.**

[For earlier annotations, see code pages 1720-1.—Ed.]

Where an intervenor, asserting right to the property, takes judgment for its return to him, he cannot afterwards recover on the bond for damages to the property. *Newton v. Round*, 109-286.

Where the plaintiff elects to take judgment

for the money value of the property, he cannot recover damages for expenses in preparing to defend the case. He is entitled only to the value of the property and legal interest. *Becker v. Staab*, 114-319.

**SEC. 4178. Plaintiff's option.**

[For earlier annotations, see code, page 1722.—Ed.]

Where a party claiming possession of the property by intervention elects to take judgment for its return, he cannot afterwards recover on the bond for damages to the property. *Newton v. Round*, 109-286.

The party found entitled to property not in his possession is given the option to have execution for delivery of the specific property, or for its value, as determined by the jury, as of the time when judgment was rendered. Such provision does not relate to the time when the action was

commenced. It is, therefore, erroneous to allow recovery of interest on the value of the property prior to the time of rendering judgment. *Bonnot v. Newman*, 109-580.

Where the plaintiff elects to take a money judgment for the value of the property in a justice's court, he may, by remitting the amount of his claim in excess of twenty-five dollars, prevent an appeal by the opposite party, under the provisions of Code § 4547. *Rust v. Olson*, 113-571.

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## CHAPTER 2.

### OF ACTIONS FOR THE RECOVERY OF REAL PROPERTY.

**SECTION 4184. Title.**

[For earlier annotations, see code, pages 1723-4.—Ed.]

Where both parties claim under a common grantor it is only necessary to prove a title from such grantor. *Brown v. Tabor*, 103-1.

The statutory provision that in an action to recover real property plaintiff must re-

cover on the strength of his own title, does not apply to a case where a plaintiff in possession of land under a claim of title is seeking to enjoin the sale thereof under execution against one who has no interest therein. *Moore v. Kleppish*, 104-319.

**SEC. 4205. New trial.**

[For earlier annotations, see code, page 1737.—Ed.]

The year within which the petition is to be filed commences to run from the time

of judgment, and not from the time of the verdict. *Bevering v. Smith*, 90 N. W., 840.

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## CHAPTER 3.

### OF ACTION FOR FORCIBLE ENTRY OR DETENTION OF REAL PROPERTY.

**SECTION 4208. Grounds.**

[For earlier annotations, see code, page 1728.—Ed.]

While originally this proceeding was criminal, it is under the statutes of this

state a special action. *Herkimer v. Keeler*, 109-680.

In this action title is not involved, except incidentally for the purpose of showing extent of possession where there is no apparent actual possession as to the entire premises, nor is the right of possession involved, since the remedy is limited to the actual peaceable possession of the plaintiff and the forcible entry and unlawful deten-

tion of the defendant. *Delmonica Hotel Co. v. Smith*, 112-659.

The right of possession cannot be determined in an action of forcible entry and detainer. The question involved is the fact of possession, not the right. *Cagwin v. Chicago & N. W. R. Co.*, 114-129.

#### SEC. 4211. Jurisdiction—transfer—appeal.

[For earlier annotations, see code, page 1729.—Ed.]

A justice of the peace may properly be given jurisdiction of an action of forcible entry and detainer. Such action does not

necessarily involve the right of possession, as distinct from the fact of possession. *Herkimer v. Keeler*, 109-680.

#### SEC. 4212. Petition—venue.

[For earlier annotations, see code, page 1729.—Ed.]

The provision that this action may be maintained before a justice of the peace in an adjoining township where there is none qualified to act in the township where the land is situated is applicable where in the latter township a justice of the peace has been elected, but has not qualified, nor

undertaken to act as an officer. *Herkimer v. Keeler*, 109-129.

Failure to verify the petition in an action for forcible entry and detainer must be taken advantage of in the trial court, otherwise the defect is waived. *Ibid.*

#### SEC. 4216. Title not investigated—transfer.

[For earlier annotations, see code, page 1730.—Ed.]

This proceeding cannot be substituted for an action of right. *Herkimer v. Keeler*, 109-680.

[The first note under this section in the Code should be changed by inserting "not" between "has" and "been" in the first line.]

#### SEC. 4217. Possession—bar.

[For earlier annotations, see code, page 1730.—Ed.]

Where a tenant holds over after the termination of a written lease, without the assent of the landlord, the thirty days' notice in writing required by Code § 2991 to terminate a tenancy at will is not neces-

sary, and if such occupancy continues for more than thirty days, with the knowledge of the landlord, the remedy by action of forcible entry and detainer is barred. *McClelland v. Wiggins*, 109-673.

## CHAPTER 4.

### OF ACTION TO QUIET TITLE.

#### SECTION 4223. Who may bring action.

[For earlier annotations, see code, pages 1731-3.—Ed.]

Where the state intervenes in an action to quiet title, and asks relief against both plaintiff and defendant, claiming title, the state must recover on the strength of its own title, and not on the weakness of that of the other claimants who are in possession. *Rood v. Wallace*, 109-5.

The owner may maintain the action here

contemplated for the purpose of removing a cloud upon his title, created by an apparent lien. The action is not limited to the determination of the rights of one who claims title. *Blair v. Hemphill*, 111-226.

One who has an equitable title only may maintain an action to quiet it. *O'Neill v. Wilcox*, 87 N. W., 742.

#### SEC. 4224. Petition—notice.

[For earlier annotations, see code, page 1733.—Ed.]

Proceedings against unknown claimants are purely statutory, and a judgment or decree can be given no greater force than that which the statute provides. Such decree is not final as to persons served with

notice only by publication until the expiration of two years, within which a new trial may be had under Code § 3796. *Williams v. Doolittle*, 88 N. W., 350.

**SEC. 4226. Demand for quitclaim—attorneys' fees.**

The statutory provision imposing attorneys' fees in actions to quiet title is penal in its nature, and should be strictly construed. The request for a deed should be made of the party who is to execute the

instrument. If it is in any case sufficient to make demand on an agent, it can only be when the agent is vested with power to make the deed. *Lawless v. Stamp*, 108-601.

## CHAPTER 5.

## OF ACTIONS TO ESTABLISH DISPUTED CORNERS AND BOUNDARIES.

**SECTION 4228. When allowed.**

[For earlier annotations, see code, pages 1734-5.—Ed.]

An adjudication in a proceeding to fix a common corner of four adjacent sections, and the boundary lines of such sections as affected by the location of such common corner, is not binding as to the interior dividing lines of such sections. *Muecke v. Barrett*, 104-413.

A county cannot maintain proceedings to settle boundaries of a county road crossing defendant's land. It is only the owner of the land who may maintain such proceeding. *Dickinson County v. Fouse*, 112-21.

Where the only dispute is as to the boundary line between two tracts, the court is not authorized, on the report of a commissioner, to establish a corner affecting the boundaries of other property owners not parties to the suit. *Newton v. Templeman*, 89 N. W., 24.

Proceedings of this character are not triable *de novo*, and the finding of the commissioner and of the court has the force and effect of the verdict of a jury. *Ibid.*

**SEC. 4237. Appeal.**

An appeal will not lie from an order appointing a commissioner to locate a corner at a certain point and taxing the costs up

to that time. *Oster v. Devereaux*, 87 N. W., 512.

## CHAPTER 6.

## OF PARTITION.

**SECTION 4240. By equitable proceedings—no joinder or counterclaim.**

[For earlier annotations, see code, pages 1737-8.—Ed.]

One of the joint owners of a water power making improvements on the common property may, on partition, have the improvements thus made by him set apart as his share. They do not necessarily become a portion of the common property in such sense that the common owners are entitled thereto. *Forrest Milling Co. v. Cedar Falls Milling Co.*, 103-619.

Where, in a proceeding to partition the real property of a decedent among his heirs, it was urged that it could not be determined whether the personalty would be sufficient to pay the debts of the estate, but it did not appear that the facts from which that question was to be determined could not be ascertained without a continuance, held, that a motion to continue on

that ground was properly overruled. *Cheney v. McColloch*, 104-249.

In an action for partition among heirs, if brought before the estate has been settled, the court may postpone final decree until the estate is settled and need not dismiss the action as prematurely brought. *Shupe v. Bartlett*, 106-654.

A right to inherit as an illegitimate child, recognized under the provisions of Code § 3385, may be interposed as a claim in a partition proceeding to which the legitimate heirs of deceased are parties. *Alston v. Alston*, 114-29.

Section applied as to joinder of other causes of action. *Watson v. Richardson*, 110-698.

**SEC. 4252. Confirmation.**

[For earlier annotations, see code, page 1740.—Ed.]

In the final decree an additional accounting may be had as to matters affecting the proper share of the parties subsequent to

the preliminary decree. *Moy v. Moy*, 111-161.

Where improvements were made in good faith, the allowance therefor is not to be limited to such as were needed to preserve the property. *Ibid.*

#### SEC. 4256. Special allotments.

[For earlier annotations, see code, pages 1740-1.—Ed.]

Under the facts in a particular case held that the party claiming to have made improvements, and to be entitled to an allowance therefor in case of the sale of the property, had so far enjoyed the rents and profits on an inadequate consideration as to be precluded from having such relief. *Bergman v. Kammlade*, 109-305.

**SEC. 4259. Judgment—decrees of partition to be recorded.** Upon the report of the referees being approved, a decree shall be rendered confirming the partition and apportioning the costs as herein provided, entering judgment therefor. Upon the rendition of such decree the clerk shall file with the county recorder of the county a duly certified transcript of such part of the entire decree, in the case in which partition has been ordered, as may be necessary to show the volume and page where such decree is recorded, and the confirmation of the shares and interests of the parties in the property of which partition is made, and the names of the parties who are found entitled to such shares, and an accurate description of each of the shares allotted to the several owners; and such transcript shall be presented to the county auditor for transfer and recorded in the deed records of the county where the action was brought and also in the other counties in the state, if any, where any of the property so partitioned is situated; and in such case the clerk shall transmit to the county recorder of each of such other counties a duplicate of such transcript, and the same shall be there so recorded and transfer so made. Such transcript shall be indexed in the recorder's office the same as conveyances of real estate with the names of the parties so entitled to such shares as grantors, and the name of the party to whom each share is allotted as grantee. The costs of making and recording such transcript shall be taxed as part of the costs in the case. [C. '73, § 3296; R., § 3642; C. '51, § 2064.] [27 G. A., ch. 106, § 1.]

[For annotations, see code, page 1741.—Ed.]

#### SEC. 4261. Attorneys' fees.

[For earlier annotations, see code, page 1742.—Ed.]

There is no authority for apportioning the attorney's fee here provided for. *Plant v. Fate*, 114-283

## CHAPTER 7.

### OF THE FORECLOSURE OF MORTGAGES.

#### SECTION 4273. Of personal property—by notice and sale.

[For earlier annotations, see code, pages 1743-4.—Ed.]

Where a chattel mortgage is executed to secure a debt past due the mortgagee has the right to foreclose it upon delivery. *Johnston v. Roebuck*, 104-523.

Where by the terms of the mortgage the mortgagee is authorized to sell at private sale he may sell the articles separately, in lots, or together, as may best suit the convenience of buyers and insure the largest returns. In such case the mortgagee is the trustee for the mortgagor and is required to act in entire good faith and conduct the sale fairly. *Ibid.*

The act of the mortgagee in taking pos-

session of the mortgaged property before the happening of contingencies which are specified by the mortgage as conditions on which the mortgagee is to take possession will constitute a conversion and render the mortgagee liable for the value of the property. *Ibid.*

Where a chattel mortgage gave to the mortgagee the right of possession and use during the continuance of the mortgage, held, that it superseded a previous contract by which the mortgagee was holding the property as bailee for hire. *Barnhart v. Hanford*, 105-116.

A foreclosure by notice and sale in accordance with the stipulations of the mortgage will be valid notwithstanding an agreement between the parties postponing the day of sale, unless the purchaser had actual notice of the agreement to postpone. *Gibson v. McIntire*, 110-417.

The parties may stipulate for a foreclosure without giving the statutory notice, and may waive damages resulting from the

sale being conducted without such notice. *Geiser Mfg. Co. v. Krogman*, 111-503.

Where a sheriff acts in making a sale under authority given in the instrument itself, and not under statutory authority, his fees are not controlled by the provisions of Code § 4277. In such a case a reasonable compensation may be allowed. *Downie v. Christen*, 88 N. W., 830.

A landlord's lien may be satisfied out of the proceeds of the sale. *Ibid.*

### SEC. 4277. Notice of sale.

The provisions of this section do not control the fees to be allowed to the sheriff for selling mortgaged chattels, in pursuance

of power given in the instrument itself. *Downie v. Christen*, 88 N. W., 830.

### SEC. 4283. How contested.

[For earlier annotations, see code, page 1745.—Ed.]

If the mortgagor has an adequate remedy at law he cannot remove the foreclosure proceeding to the district court by injunction.

*McCormick Har. Mach. Co. v. De La Mater*, 114-382.

### SEC. 4285. Sale under pledge.

Foreclosure in court is one method of enforcing a pledge lien. The lien in such case merges in the judgment and there sub-

sists to be made effective by special execution. *Croft v. Colfax E. L. & P. Co.*, 113-455.

### SEC. 4288. Separate suits on note and mortgage.

[For earlier annotations, see code, page 1748.—Ed.]

A suit may be maintained on a note in one county and, in a proper case, an action for the foreclosure of the mortgage in another. *McDonald v. Second Nat. Bank*, 106-517.

It seems that a foreclosure suit may proceed independently of the action on the note secured by the mortgage. *Smith v. Moore*, 112-60.

### SEC. 4289. Judgment—sale and redemption.

[For earlier annotations, see code, pages 1748-52.—Ed.]

The possession of a mere mortgagee is not entitled to protection as against the owner of the fee obtained under a sale made in pursuance of the foreclosure of a prior mortgage. *McDonald v. Second Nat. Bank*, 106-517.

A sale of all of the mortgaged premises, under a decree of foreclosure, for a part of the mortgage debt which is due, discharges the premises from the lien of the mortgage for the part of the debt not due, and for which the decree does not provide. But in actions for the foreclosure of mortgages for installments due, jurisdiction may be retained to provide for the collection of the installments not due. It is not proper, however, to provide that the sale for the installments due shall be subject to a lien for the installments not due. *Kilmer v. Gallagher*, 107-676.

Unless a court retains jurisdiction of a case to provide for future installments, a sale of the mortgaged premises under foreclosure passes to the purchaser all the title and interest of the mortgagor and mortgagee in and to the premises, and the purchaser takes free from the lien of unpaid installments, and it is immaterial that the

unpaid installments are evidenced by separate notes and mortgages. *Wells v. Ordway*, 108-86.

There is a marked difference between redemption by judgment debtor and redemption by his grantee. It is the policy of the law to secure to the debtor, as nearly as practicable, the full value of his property sold on execution. When the grantee of the mortgagor acquires the right to redeem, and a junior lienholder fails to exercise his privilege, and is barred by lapse of time, the grantee may redeem without removing such bar, and thus perfect the title in himself. *Co-operative Sav. & L. Assn. v. Kent*, 108-146.

The grantor in a conveyance which is found to be a mortgage is entitled to possession until decree of foreclosure and expiration of the statutory period of redemption. *Harrington v. Foley*, 108-287.

Where in foreclosure of a mortgage a receiver has been appointed he is entitled to his compensation out of the proceeds of the sale of the mortgaged property. *Ibid.*

The statutory right to redeem cannot be cut off by agreement of the parties, nor by the mortgagee's possession, and exists until

barred by statute. When the right is sought to be exercised the mortgagee or grantee in possession will be required to account for the land and profits, and for all the proceeds of the land and other securities. *Adams v. Holden*, 111-54.

A mortgage in this state does not create

an estate, but simply a lien or a charge upon the land to secure the debt, and a suit for foreclosure is barred in ten years, and as the rights of mortgagor and mortgagee are reciprocal, redemption under a mortgage will be cut off in the same time. *Ibid.*

#### SEC. 4293. Other liens.

[For earlier annotations, see code, pages 1753-4.—Ed.]

These provisions as to applications of payments apply to the disposition of the surplus in the hands of the mortgagee

after his debt is satisfied. *Citizens Bank v. Whinery*, 110-390.

#### SEC. 4295. Satisfaction acknowledged.

[For earlier annotations, see code, page 1754.—Ed.]

The penalty provided in this section cannot be enforced where the satisfaction relied on is a decree rendered against an insane mortgagee, the year allowed for applying for new trial after the incapacity is removed not having expired. *Pollock v. Milburn*, 112-528.

A court of equity has no power to enjoin a proceeding by a justice of the peace to enjoin the penalty provided for in this section on the ground that the mortgage is not in law and fact satisfied. *Home Sav. & T. Co. v. Hicks*, 89 N. W., 103.

#### SEC. 4297. Foreclosure of title bond.

[For earlier annotations, see code, pages 1754-6.—Ed.]

It may be provided in a contract to convey that on failure to pay as agreed the

rights of the vendee shall be forfeited. *Bigler v. Jack*, 114-667.

### CHAPTER 8.

#### OF ACTION FOR NUISANCE, WASTE, AND TRESPASS.

#### SECTION 4302. Nuisance—what constitutes—action to abate.

[For earlier annotations, see code, pages 1756-60.—Ed.]

Under the evidence in a particular case, held, that the use which defendant was making of the river adjoining his premises was a proper one, in view of the business carried on and the conditions existing in the locality, and that defendant was not creating a nuisance. *Bennett v. National Starch Mfg. Co.*, 103-207.

In a supplemental petition the plaintiff may in the same action set up a continuance of the nuisance for the purpose of recovering additional damages. *Foot v. Burlington Gas Light Co.*, 103-576.

Where a contract gave one party the right to construct a drain over the land of another, held that it did not confer the

right to maintain a nuisance, and that, even if the plaintiff knew of the existence of such nuisance when he bought the premises, he would not be estopped thereby from action to recover damages therefor and abate the same. *Van Fossen v. Clark*, 113-86.

A nuisance may exist so as to cause special damage to a private person where such damage is not susceptible of direct and positive proof, and in such case it is the rule that where the nuisance is shown to exist the law presumes damage for the injury to the right, and the jury is given large discretion in fixing the amount thereof. *Ibid.*

### CHAPTER 9.

#### OF ACTIONS TO TEST OFFICIAL AND CORPORATE RIGHTS.

#### SECTION 4313. For what causes.

[For earlier annotations, see code, pages 1761-2.—Ed.]

Courts of equity have no jurisdiction to determine the respective rights of claim-

ants to a public office. An injunction will not lie to restrain a person acting as a pub-

lic officer from exercising the functions pertaining to the office on the ground that he is not entitled to it. *State v. Alexander*, 107-177.

An action to test the right of defendant to hold and perform the duties of a public office may be brought. A proceeding to con-

test the officer's election is not exclusive. *Ibid.*

A petition for *quo warranto* to test the right of an incumbent of a county office to hold the same may be entertained, notwithstanding the provision of Code § 1198 for election contests. *Haverstock v. Aylesworth*, 113-378.

#### SEC. 4316. By private person.

[For earlier annotations, see code, pages 1762-3.—Ed.]

A resident and taxpayer of a city may maintain an action by *quo warranto* to test the legality of the appointment of water-

works trustees under the provisions of Code § 747. *State v. Barker*, 89 N. W., 204.

### CHAPTER 11.

#### OF ACTIONS OF MANDAMUS.

#### SECTION 4341. Definition.

[For earlier annotations, see code, pages 1765-8.—Ed.]

Mandamus is the proper action for compelling the board of supervisors to canvass corrected election returns. *Rummel v. Dealy*, 112-503.

One who claims to be the lowest bidder for work to be done for a public corporation, under a statute providing for an award of such contract to the lowest bidder, has not such interest as to authorize him to maintain an action of mandamus to compel the awarding to him of the contract, nor is the awarding of such a contract so

far a ministerial act that the action of the public authorities can be controlled by such action. *Vincent v. Ellis*, 88 N. W., 836.

The granting of a writ of mandamus is not a matter of right, and rests very largely within the discretion of the court. *Ibid.*

This action may be maintained to compel the officers of a private corporation to issue certificates of stock or transfer them on the books of the company. *Hair v. Burnell*, 106 Fed., 280.

#### SEC. 4344. Other remedy.

[For earlier annotations, see code, page 1768.—Ed.]

Mandamus to compel a road supervisor to remove obstructions from a portion of a highway which has been vacated will not lie to contest the regularity of the proceedings of the board of supervisors in making the order. *Sullivan v. Robbins*, 109-235.

An action of mandamus may be maintained by voters to compel the board of supervisors to canvass returns of election not properly certified, when the certificate is corrected by the officers making the return. *Rummel v. Dealy*, 112-503.

#### SEC. 4345. Who may bring action.

[For earlier annotations, see code, pages 1768-9.—Ed.]

One of the signers of a petition to the board of supervisors, asking submission of a question to the vote of the people, may maintain mandamus to compel the

board to perform its duty in the submission of such question. *Windsor v. Polk County*, 87 N. W., 704.

### CHAPTER 12.

#### OF INJUNCTIONS.

#### SECTION 4354. When allowed.

[For earlier annotations, see code, pages 1771-2.—Ed.]

In actions at law. The provision for injunction in actions brought by ordinary proceedings does not apply where the claimant to an office is seeking to get pos-

session thereof. *State v. Alexander*, 107-177.

To restrain trespass. A threatened trespass of a continuing character may be re-

strained by injunction. *Halpin v. McCune*, 107-494.

To restrain wrongful acts as to real property. An injunction will lie to prevent the act of the tenant in violation of the covenants of his lease, whether constituting waste or not. *Kraft v. Welch*, 112-695.

The removal of a building which is an interference with real estate such as to absolutely deprive the plaintiff of the beneficial enjoyment of its present use may be restrained if such threatened removal is without lawful authority. *Lemmon v. Guthrie Center*, 113-36.

Adequate remedy at law. A court of equity will not interfere by injunction where the party asking relief has a plain, speedy and adequate remedy in the ordinary course of law, nor will an injunction lie to test the validity of a criminal statute. *Ewing v. Webster City*, 103-226.

But a court of equity may enjoin an act, even though it be punishable as a crime, if it is one which would cause irreparable injury. *Ibid.*

Therefore, held, that the enforcement of an ordinance providing a penalty for buying or selling within the city limits without the commodity being weighed at the public scales, might be enjoined if it should be found to be void and would cause irreparable injury to the party complaining, without plain, speedy and adequate remedy at law. But, held, that the ordinance in question was valid and its enforcement would not be enjoined. *Ibid.*

To restrain illegal tax. A taxpayer may maintain an action to enjoin the carrying out of a resolution increasing the number of wards in a city, there being no authority to change the wards by resolution. *Cascaden v. Waterloo*, 106-673.

Where a tax is void, equity will grant relief against its enforcement. *Chicago, M. & St. P. R. Co. v. Phillips*, 111-377.

A court of equity will not enjoin the collection of a tax on account of excessive assessments fraudulently made. The remedy afforded to the taxpayer by application for relief to the board of review, under Code § 1373, is exclusive. *Crawford v. Polk County*, 112-118.

#### SEC. 4359. Notice in other cases.

[For earlier annotations, see code, page 1778.—Ed.]

The words "operation of a railway" mean the operation of a constructed railway, and not the construction of a railway. *Johnston v. Chicago, M. & St. P. R. Co.*, 58-537.

A temporary injunction to stop a rail-

Where a city council has no authority whatever to assess property for street improvements, the owner of property illegally assessed may enjoin the enforcement of the assessment without resorting to an appeal. *Ft. Dodge Elec. L. & P. Co. v. Ft. Dodge*, 89 N. W., 7.

To restrain official action. An injunction will lie to restrain the removal of the county records from the place where the court house is legally established to a place unlawfully selected by the board of supervisors as a county seat. *Way v. Fox*, 109-340.

A court of equity will not by injunction restrain the proceedings of a justice of the peace on the ground that he is without jurisdiction, as that objection may be interposed in the proceeding itself. *Home Sav. & T. Co. v. Hicks*, 89 N. W., 103.

Right to public office. An injunction will not lie to restrain a person acting as a public officer from exercising the functions of the office on the grounds that he is not entitled to the office; but it seems that an injunction will lie in favor of the incumbent of an office to protect him in the discharge of the duties of the office against an adverse claimant until the latter shall have established his right to the office by an action at law. *State v. Alexander*, 107-177.

An injunction will not lie to restrain a person acting as a public officer from exercising the functions pertaining to the office on the ground that he is not entitled to such office. In such case the legal remedy is adequate. *District Tp. v. Myles*, 109-541.

To restrain mortgagee. It is proper in an action of replevin based on rights claimed under a chattel mortgage for defendant to ask an injunction restraining plaintiff from enforcing any claim under such mortgage with reference to property not subject thereto. *Brody v. Chittenden*, 106-340.

Formal writ. The issuance of a formal writ of injunction is not necessary to bind a party who was represented in the case by attorney when the final decree was rendered. *Hawks v. Fellows*, 108-133. See, also, notes to Code § 4372 in this Supplement.

road company from proceeding with its work of building its road, or the operation of a part already constructed, should not be issued without notice. *Minneapolis & St. L. R. Co. v. Chicago, M. & St. P. R. Co.*, 88 N. W., 1082.

#### SEC. 4364. When to restrain proceedings or judgment.

[For earlier annotations, see code, pages 1789-1.—Ed.]

Remedy by injunction to stay execution in a case pending in the supreme court

should be sought in that court. *Hyatt v. Clever*, 104-338.

The district court of another county than that in which judgment is rendered cannot entertain an action to have such judgment set aside and declared void, even though the

contention is that it is absolutely without validity for want of jurisdiction to render it. *Hawkeye Ins. Co. v. Huston*, 89 N. W., 29.

### SEC. 4372. Proceedings for violation.

[For earlier annotations, see code, pages 1783-4.—Ed.]

The remedy for violation of an injunction is a proceeding to punish for contempt, and where the party against whom an injunction was granted gave a supersedeas bond on appeal from the decree, held, that in a suit on the supersedeas bond the opposite party could not recover damages for violation of the injunction. *Cole v. Edwards*, 104-373.

As to a party, the decree is as effectual, so far as it is self-enforcing as though a formal writ had been issued and served. This is not true in regard to a writ not self-enforcing, as one providing for the abatement of a nuisance, and process is required to authorize an officer to do acts required to accomplish the abatement. *Bartel v. Hobson*, 107-644.

In a proceeding for contempt in violating a preliminary injunction, the supreme court will assume, on certiorari, that the order granting the temporary injunction was rightfully made, and it may find a violation of the order, although the district judge may have found that no contempt had been committed. *Lake v. Wolfe*, 108-184; see, also, *Hawks v. Fellows*, 108-133.

It is doubtful whether the provisions of this section apply to proceedings to punish for contempt in violating an injunction with reference to the sale of intoxicating liquors, under Code § 2407. *McGlasson v. Scott*, 112-289.

## CHAPTER 14.

### OF ARBITRATION.

#### SECTION 4386. Written agreement.

[For earlier annotations, see code, pages 1785-6.—Ed.]

A general agent without express authority may not submit a claim of his principal to arbitration, nor does a special ad-

ministrator, in the administration of the estate, have such power. *Sullivan v. Nicoulin*, 113-76.

#### SEC. 4390. Revocation.

An agreement to arbitrate, included in a policy of fire insurance, is revocable by either party, notwithstanding the provi-

sions of this section, and the bringing of suit constitutes such revocation. *Harrison v. Hartford F. Ins. Co.*, 112-77.

## CHAPTER 15.

### OF ACTIONS AGAINST BOATS OR RAFTS.

#### SECTION 4402. Seizure.

[For earlier annotations, see code, pages 1790-1.—Ed.]

A lien given by a state statute for labor done in the original construction of a vessel even after she is launched is not enforceable in the federal admiralty courts as

the contract is not of a maritime nature, the vessel not yet having become engaged in commerce. *The William Windom*, 73 Fed., 496.

## CHAPTER 17.

### OF CONTEMPTS.

#### SECTION 4460. What punishable as.

[For earlier annotations, see code, pages 1798-9.—Ed.]

A witness cannot be punished for contempt for not responding to a subpoena issued from a court in which no proceed-

ing is pending. *Chambers v. Oehler*, 107-155.

**SEC. 4462. Punishment.**

[For earlier annotations, see code, pages 1799-1800.—Ed.]

A proceeding to punish a contempt of court may be in its nature criminal, but the statutory provision with regard to new trial in criminal cases is not applicable in such a proceeding. *State v. Stevenson*, 104-50.

The power to punish for contempt is recognized as inherent in our courts and essential to the preservation of order in judicial proceedings and to the due administration of justice. *Fields v. Thornell*, 106-7.

**SEC. 4465. Notice to show cause.**

[For earlier annotations, see code, page 1800.—Ed.]

Where the party in contempt advised the court that he was ready for punishment, and challenged the court to inflict such punishment, held that it was not error to

proceed without giving opportunity for written explanation. *Hardin v. Silvari*, 114-157.

## TITLE XXII.

### OF JUSTICES OF THE PEACE AND THEIR COURTS.

#### CHAPTER 1.

##### OF JUSTICES OF THE PEACE AND THEIR COURTS.

###### SECTION 4476. Jurisdiction.

[For earlier annotations, see code, page 1808.—Ed.]

A justice of the peace does not acquire jurisdiction of a non-resident defendant, even though the latter appears and files a counterclaim or goes to trial without objection. *Heath v. Halfhill*, 106-131.

The residence of the parties, in the absence of any showing to the contrary, is presumed to have been such as to confer

jurisdiction on the justice. *Little v. Devendorf*, 109-47.

A judgment against one who is an actual resident of another county, unless founded on a contract payable in the county, is void although defendant appeared without objection. *Thompson v. Thompson*, 90 N. W., 493; *Porter v. Walsh*, 90 N. W., 582.

###### SEC. 4477. Amount in controversy.

[For earlier annotations, see code, pages 1804-5.—Ed.]

No objection having been made before the justice of the peace to his jurisdiction, the court on an appeal from his judgment in an action involving more than one hundred dollars and less than three hundred dollars, is authorized to presume that the parties gave their consent to a trial before the justice. *Hopkins Fine Stock Co. v. Reid*, 106-78.

No action of the parties can authorize a justice of the peace to assume jurisdiction for a greater amount than three hundred dollars. Want of jurisdiction on this account cannot be waived by the parties, but the defect may be urged at any stage of the proceeding. *Wedgewood v. Pare*, 112-514.

###### SEC. 4484. Entries on docket.

[For earlier annotations, see code, page 1806.—Ed.]

It is not necessary that the justice enter of record a finding as to the residence of the parties. *Little v. Devendorf*, 109-47.

###### SEC. 4485. Parties—proceedings.

[For earlier annotations, see code, page 1806.—Ed.]

Trials in justices' courts are less formal and more speedy, as a rule, than are trials

in courts of record. *Gates v. Knosby*, 107-239.

###### SEC. 4486. How commenced.

[For earlier annotations, see code, pages 1806-7.—Ed.]

A justice of the peace acquires jurisdiction in an action of forcible entry and detainer, although no petition is filed until

the return day. *Herkimer v. Keeler*, 109-680.

###### SEC. 4491. Service and return.

[For earlier annotations, see code, pages 1807-8.—Ed.]

Determination of the sufficiency of service is within the jurisdiction of the justice, and his judgment with reference

thereto, though erroneous, will not be void. *Little v. Devendorf*, 109-47.

###### SEC. 4496. Adjournment.

A justice of the peace will not lose jurisdiction of the case by granting a continuance for an indefinite time, by consent of

parties, to subsequently try the case upon new notice. *Cedar Rapids v. Rall*, 88 N. W., 826.

**SEC. 4519. Discharge of jury.**

The statute does not provide for notice to a party of the issuing of a precept for a new jury where one jury has been discharged for failure to agree; but where

such precept was not issued for two days, held that the justice was without jurisdiction to try the case without further notice. *Gates v. Knosby*, 107-239.

**SEC. 4522. Judgment entered.**

[For earlier annotations, see code, page 1813.—Ed.]

It is not essential to the validity of the judgment that it be signed by the justice. *Parks v. Norton*, 114-732.

**SEC. 4538. Effect of transcript.** The clerk shall file the transcript as soon as received, and enter a memorandum thereof and the time of filing in the judgment docket and lien index, and from such entry it shall be treated in all respects and in its enforcement as a judgment obtained in the district court. No execution shall issue from the justice's court after the filing of such transcript. [C. '73, § 3568; R., § 3910; C. '51, § 2321.] [27 G. A., ch. 107, § 1.]

[For earlier annotations, see code, page 1814.—Ed.]

With the filing of the transcript in the district court the justice loses control of his judgment, and it is treated thereafter as are those of the district court; but there is nothing warranting the conclusion that the judgment of the justice is thereby canceled, or a new one rendered. *Little v. Devendorf*, 109-47.

The mere filing of a transcript from a justice of the peace does not make it a judgment of the district court. A memorandum thereof, with the date of filing, must be entered on the judgment docket and lien index. *State Ins. Co. v. Prestage*, 90 N. W., 62.

**SEC. 4544. Garnishment.** Garnishment proceedings under execution shall be the same as in the district court, except, upon return of the garnishment being made to the justice who issued the execution, he shall docket a cause, fix a time, and cite the garnishee then to appear and answer. Judgment against the garnishee shall not be entered until the principal defendant shall have had five days notice of the garnishment proceedings to be served in the same manner as original notices. [29 G. A., ch. 141, § 1.]

**SEC. 4546. Appeal.**

[For earlier annotations, see code, pages 1815-16.—Ed.]

The complaint that there is not sufficient evidence to warrant the judgment rendered by a justice is not one which can be con-

sidered on writ of error. *Anthes v. Booser*, 112-511.

**SEC. 4547. Amount in controversy.**

[For earlier annotations, see code, pages 1816-17.—Ed.]

Where before judgment but after the hearing of the evidence the plaintiff remits a portion of his claim so as to reduce the amount thereof to less than twenty five dollars, there is no right of appeal, although the justice of the peace erroneously enters judgment for the amount of the original claim which is in excess of twenty-five dollars. *Young v. Stuart*, 104-597.

A fictitious counterclaim, interposed sole-

ly for the purpose of giving the district court jurisdiction on appeal, may be disregarded by the latter court and the appeal may be dismissed on motion. *Chicago & N. W. R. Co. v. Weaver*, 112-101.

Where plaintiff in an action of replevin elects to take judgment for the value of the property, he may, by remitting his claim in excess of twenty-five dollars, prevent an appeal by the opposite party. *Rust v. Olson*, 113-571.

**SEC. 4552. Form of bond.**

[For earlier annotations, see code, page 1818.—Ed.]

An appeal bond signed by the attorney of the appellant is not sufficient (see Code § 3851), and in the district court the case should be dismissed on motion of the

appellee. Such bond should not be accepted. *Valley Nat. Bank v. Garretson*, 104-655.

An attorney is not competent as a surety

on an appeal bond (Code § 3851), nor is a party against whom the judgment is entered competent to become such surety, the signature of the party not changing his liability as a defendant under the judgment. *Hudson v. Smith*, 111-411.

An appeal bond signed only by the appel-

#### SEC. 4557. Mistakes corrected.

[For earlier annotations, see code, page 1819.—Ed.]

Evidence in a particular case held not sufficient to show that there was an omission or mistake necessitating the correc-

lants is of no validity, and the district court acquires no jurisdiction on such appeal. The defect cannot be cured by amendment in the district court. *Minton v. Ozias*, 88 N. W., 336; *Seabold v. Schevers*, 89 N. W., 1121.

tion of the justice's docket. *First Nat. Bank v. Bourdelais*, 109-497.

#### SEC. 4558. Return—when made.

[For earlier annotations, see code, page 1819.—Ed.]

The appeal is perfected by the giving of bond and certifying the papers and record to the district court. The provision for notice seems to be for the purpose of advising appellee when the case will be

brought on for trial, and failure to give such notice does not deprive the court of jurisdiction. *Durand v. Northwestern L. & Sav. Co.*, 112-296.

#### SEC. 4559. Affirmance—trial.

If the appellant in an appeal from a justice's court fails to cause the same to be docketed by noon of the second day of the term to which the same is returnable, appellee may procure the case to be docketed and will thereupon be entitled to have the

judgment below affirmed; and the appellant in such case will not be entitled to have the default set aside without a showing of excuse. *Hadowal v. Yearous*, 103-32.

For similar provisions, see Code § 3660.

#### SEC. 4562. Trial of appeal.

[For earlier annotations, see code, pages 1820-1.—Ed.] \*

In an appeal to the district court from a justice of the peace an amendment may be introduced which does not set up any new demand or counterclaim. *Boos v. Dulin*, 103-331.

Where an action brought by a minor in

his own name in justice court was appealed to the district court, held, that the district court might properly allow the substitution of a next friend and proceed with the case. *Parkins v. Alexander*, 105-74.

#### SEC. 4563. New demand.

[For earlier annotations, see code, page 1821.—Ed.]

In the district court the pleading may be amended, but no new cause of action

or counterclaim can be introduced. *Boos v. Dulin*, 103-331.

#### SEC. 4569. Writs of error—when allowed.

[For earlier annotations, see code, page 1823.—Ed.]

The complaint that there is not sufficient evidence to warrant the judgment rendered by a justice is not one which can be con-

sidered on writ of error. *Anthes v. Booser*, 112-511.

#### SEC. 4576. Judgment.

[For earlier annotations, see code, pages 1824-5.—Ed.]

Where the justice of the peace had by delay lost jurisdiction to issue a precept for a new jury, held that the district court reversing on writ of error the judgment

thus rendered without jurisdiction, might direct further proceedings upon proper notice. *Gates v. Knosby*, 107-239.

#### SEC. 4597. Fees of justice.

[For earlier annotations, see code, page 1828 —Ed.]

Where tax lists were placed in the hands of a justice of the peace for collection of the taxes included therein, held, that he took such lists as agent for collection and

not in his official capacity, and therefore was entitled only to the compensation agreed upon and not to his legal fees. *Peters v. Davenport*, 104-625.

## TITLE XXIII.

### OF EVIDENCE.

#### CHAPTER 1.

##### OF GENERAL PRINCIPLES OF EVIDENCE.

#### SECTION 4601. Witnesses—who competent.

[For earlier annotations, see code, page 1830.—Ed.]

In a criminal case a new trial should be granted where one of the witnesses for prosecution, giving material evidence, was not sworn and the omission was not discovered until after the verdict. *State v. Lugar*, 88 N. W., 333.

#### SEC. 4602. Credibility.

[For earlier annotations, see code, page 1830.—Ed.]

Conviction in a federal court of an offense not infamous cannot be shown in a state court as affecting the credibility of a witness. *Palmer v. Cedar Rapids & M. R. Co.*, 113-442.

The intention of this section is to allow

proof of facts as affecting credibility which at common law would have rendered the witness incompetent, and at common law a conviction did not render the witness incompetent unless it was for an infamous offense. *Ibid.*

#### SEC. 4604. Transaction with person since deceased.

[For earlier annotations, see code, pages 1831-7.—Ed.]

To what action applicable. This section has no application in an action not against either of the classes of persons contemplated. *McClintic v. McClintic*, 111-615.

This section does not apply to proceedings in the federal court inasmuch as there are provisions of the federal statute on the subject. *Travis v. Nederland L. Ins. Co.*, 104 Fed., 486.

**Who excluded as parties.** A surviving partner is within both the letter and the spirit of the statute. As he cannot have the benefit of the testimony of his deceased partner as to what the conversation really was, he is not liable on the testimony of his adversary respecting such conversation. The fact that the representative of the deceased partner is not a party to the action is immaterial. *Salyers v. Monroe*, 104-74.

The fact that a witness was the secretary of plaintiff corporation, it not appearing that he had any interest in the suit, held not to disqualify him as witness to testify to personal transactions with decedent against whose estate the claim is made. *University of Chicago v. Emmert*, 103-500.

Three elements must exist in order to exclude testimony as to a personal transaction with deceased: (1) the matter must be in the nature of a personal transaction or communication; (2) the witness

must be a party to the suit or interested in the event thereof; (3) the action must be against the executor, administrator, assignee, etc. And held that the appointee of a decedent as beneficiary of an insurance policy was not an assignee within the provisions of the statute. *Shuman v. Supreme Lodge K. of H.*, 110-480.

A party defendant in an action by an heir to quiet title to inherited land, where the defense is made that the land was inherited by an illegitimate child, is not competent to testify to transactions, conversations and illicit relations with the deceased. *McCorkendale v. McCorkendale*, 111-314.

It is only a person who is connected with the proceedings by service of notice, or by consent through voluntary appearance, who can be deemed a party to the proceeding under the provisions of this section. *Hicks v. Williams*, 112-691.

While a party to the suit is precluded from testifying regardless of interest in the result, held that in a proceeding by intervention in which no relief was asked against the defendant in the original suit it was so far a distinct proceeding that the defendant, having no interest in the intervention proceeding, might testify. *Hogan v. Sullivan*, 114-456.

A party is disqualified under this section, although he is merely a nominal party, or has no substantial interest in the action, but he must be in fact a party at the time

of giving testimony. *Clinton Sav. Bank v. Grohe*, 88 N. W., 357.

One through whom plaintiff derives an interest is disqualified. *Ibid.*

The statute is not limited in its exclusion of testimony to those persons whose rights may be affected by the transaction or communication referred to. *Stolenburg v. Diercks*, 90 N. W., 525.

**What interests disqualify.** The interest which will prevent a person from testifying is such an interest in the event as would at common law disqualify the witness, and if such interest is collateral merely the competency of the witness may be restored by a release or transfer of it at any time before testifying. *Dubuque Lum. Co. v. Kimball*, 111-48.

The interest must be such as would have disqualified the witness at common law. *Hicks v. Williams*, 112-691.

The witness to be disqualified under this section on account of interest must have a legal, certain and immediate interest in the suit, and one who is interested only as prospective heir is not disqualified on that account. *Bird v. Jacobus*, 113-194.

The interest of the witness, to disqualify him, must be present, certain and vested. It is not sufficient that he, at a former time, had an interest. *Clinton Sav. Bank v. Grohe*, 88 N. W., 357.

**What deemed personal transaction.** Where a certificate of deposit taken in the name of deceased was indorsed by the administrator of deceased in his individual capacity and the money drawn thereon from the bank, held, that such fund *prima facie* belonged to the estate and that the administrator was not competent to testify in a proceeding in which it was sought to subject real property to the payment of the debts of the estate, that by a personal transaction with deceased he had become the owner of the certificate of deposit, so that the proceeds thereof were not subject to the payment of the debts of deceased. *Duffield v. Walden*, 102-676.

An indorsee cannot testify in a suit against his immediate indorser who is deceased with reference to the condition of the paper when transferred as that would be a personal transaction. *Benton County Sav. Bank v. Strand*, 106-606.

While one who has become a holder of a note may not, in the case governed by this section, testify to the personal transaction of the transfer of the instrument to the deceased, he may testify that he never transferred it to anyone else. *Walkley v. Clarke*, 107-451.

Competent testimony as to a conversation with a third person involving a statement of what has taken place between the witness and the deceased person is not prohibited by this section. *Ibid.*

Those interested in the litigation are not under this section, prohibited from testifying to facts from which inferences may be drawn. *Furenes v. Eide*, 109-511.

The testimony of the payee of a note that he saw the payor, who is deceased, sign the note, is testimony as to a personal transaction. *Watters v. McGreavy*, 111-538.

A witness cannot by testimony as to a transaction of a third person with the deceased, in which the witness himself takes part, evade the rule as to testimony of personal transactions. He cannot by indirection do that which the law says may not be done. *Ibid.*

In a controversy as to whether a son was entitled to recover damages against the estate of his deceased father for failure of the father to comply with a contract to convey, held that evidence of the son with reference to the taking possession of the farm and making improvements thereon was not incompetent as relating to a personal transaction with the deceased. *Hutton v. Doxsee*, 89 N. W., 79.

**Conversations or transactions in presence of witness.** A witness may testify to a conversation heard by him between deceased and another in which he took no part; such testimony does not relate to a personal transaction. *Allbright v. Hannah*, 103-98.

The wife of a person prohibited by this section from testifying may herself testify as to what took place in his presence. *Dettmer v. Behren*, 106-585.

The husband or wife of a party to the action may testify to a conversation between such party and one who is then deceased, in which the witness did not participate. *Allison v. Parkison*, 108-154.

This section does not prevent a witness from testifying as to a conversation between deceased and another person in his presence in which the witness took no part. *Mallow v. Walker*, 88 N. W., 452.

**Letters.** Testimony by a witness as to the receipt of a letter from the deceased is as to a personal transaction or communication, within the terms of this section. *McCorkendale v. McCorkendale*, 111-314.

Letters by a witness to a deceased, if material and admissible as declarations of the witness, are not excluded by the terms of this section. *Howe v. Richards*, 112-220.

Where letters were relied on as a recognition of an illegitimate child, held that the testimony of the child to whom the letters were written with reference to the receipt of such letters and the signature of the writer was not excluded by the provisions of this section, inasmuch as the genuineness of the letters and not the communication involved therein was the material matter of inquiry. *Britt v. Hall*, 90 N. W., 340.

**Removal of prohibition.** Where plaintiff sought to recover against an estate for work and labor performed for deceased under an implied contract, and the administrator testified as to the physical needs and condition of deceased at the time when such services were rendered, held, that the

claimant might, under the exception of the statute, testify as to the same facts. *Ridler v. Ridler*, 103-470.

The fact that the executor testifies in his own behalf does not in itself remove the prohibition as to testimony of the opposite party. It is only removed as to communications or transactions with the deceased as to which the executor has testified. *Boardman v. Brown*, 114-678.

The admission of a receipt, or deed, or contract, or other writing of a deceased person is not sufficient to admit the testimony of a living witness otherwise incompetent under the statute, and this rule applies to the books of account of deceased. *Whisler v. Whisler*, 89 N. W., 1110.

**How objection raised.** Under this section the witness is made incompetent to testify as to such transactions or communications, and an objection to a question, calling for testimony as to such transactions or communications, that the evidence is incompetent, does not raise the question as to the competency of the witness. *Burdick v. Raymond*, 107-228.

**SEC. 4606. Husband or wife as witness.** Neither the husband nor wife shall in any case be a witness against the other, except in a criminal prosecution for a crime committed one against the other, or in a civil action or proceeding one against the other, or in a civil action by one against a third party for alienating the affections of the other; or in any civil action brought by a judgment creditor against either the husband or the wife, to set aside a conveyance of property from one to the other on the ground of want of consideration or fraud, and to subject the same to the payment of his judgment; but in all civil and criminal cases they may be witnesses for each other. [15 G. A., ch. 33; C. '73, § 3641; R., § 3983; C. '51, § 2391.] [27 G. A., ch. 108, § 1.]

[For earlier annotations, see code, pages 1837-8.—Ed.]

**After marriage terminated.** This section does not apply if the marriage relation has been severed when the witness is offered. *Hitt v. Sterling-Gould Mfg. Co.*, 111-458.

**Fraudulent conveyances.** The provisions added to this section by § 1, ch. 108, Acts 27 G. A., with reference to actions to set aside fraudulent conveyances, are not unconstitutional as being class legislation. The act applies to every person coming within the relation and circumstances provided for. *Burk v. Putnam*, 113-232.

Nor is the statute unconstitutional as

The objection of incompetency, with more, goes to the evidence and not to the witness, and does not raise the question whether the witness is competent to testify under this section. *McDonald v. Young*, 109-704.

The objection that the witness cannot testify as to personal transactions is not to be made when he is first sworn, but when he is asked to testify as to such transactions, and if objection is not then made it must be deemed as waived. *Chew v. Holt*, 111-362.

Objection to the testimony of a witness under this section is not sufficiently raised by the general objection that the evidence is incompetent. *Foxton v. Moore*, 87 N. W., 492.

It is not proper to receive evidence which is objected to on the ground that it relates to a personal transaction or communication, and at the end of the introduction of the evidence to instruct the jury that they shall not consider so much thereof as relates to such communications and transactions. *In re Hull's Will*, 89 N. W., 979.

requiring answers to incriminating questions. In view of the statutory provision on that subject (Code § 4612) it must be assumed that the witness is not required to answer questions which would tend to incriminate him. *Ibid.*

The statute is not retroactive. *Cedar Rapids Nat. Bank v. Lavery*, 110-575.

Declarations of the wife as to her title to real property previously conveyed by her to her husband are not admissible for the purpose of impeaching the title of the husband. *Ibid.*

**SEC. 4607. Communications between husband and wife.**

[For earlier annotations, see code, page 1838.—Ed.]

Where it was claimed that a conveyance was joined in by the wife in pursuance of threats made to the husband, and by him communicated to the wife, held that the fact of such communication might be proved by the testimony of the husband. *Giddings v. Iowa Sav. Bank*, 104-676.

The statutory prohibition extends in express terms to cases where the marriage

relation has ceased to exist. *Shuman v. Supreme Lodge K. of H.*, 110-480.

The provisions of this section absolutely close the mouth of husband or wife as to any communication made by one to the other during marriage. Such a communication is not merely privileged, but evidence of the parties with reference thereto is against public policy. *Hertrich v. Hertrich*, 114-643.

Where the question at issue was whether the husband had deserted and abandoned his wife, held that she as a witness might be allowed to testify as to conversations

between them so far as they were explanatory of the treatment she received from her husband. *Wright v. Wright*, 114-748.

**SEC. 4608. Communications in professional confidence.** No practicing attorney, counselor, physician, surgeon, or the stenographer or confidential clerk of any such person, who obtains such information by reason of his employment, minister of the gospel or priest of any denomination shall be allowed, in giving testimony, to disclose any confidential communication properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline. Such prohibition shall not apply to cases where the party in whose favor the same is made waives the rights conferred. [C. '73, § 3643; R., §§ 3985-6; C. '51, §§ 2393-4.] [28 G. A., ch. 125, § 1.]

[For earlier annotations, see code, pages 1838-9.—Ed.]

Where several different physicians had treated a person for an injury received from a defective sidewalk, held, that the fact that plaintiff called one of such physicians as a witness did not waive the privilege of objecting to evidence of the other physicians as to communications relating to such injury. *Baxter v. Cedar Rapids*, 103-599.

Communications to a veterinary surgeon are not privileged. *Hendershott v. Western Union Tel. Co.*, 106-529.

Statements made by an injured railroad employe to a surgeon in the employ of the company, who visits him for the purpose of treating him for his injuries are privileged. *Keist v. Chicago G. W. R. Co.*, 110-32.

A patient may waive the privilege in case of a communication to his physician, and in cases of contests of wills where the parties are claiming rights of the estate through devise, inheritance, or in a representative capacity, those representing the estate may also waive the privilege, but in an action on a mutual benefit certificate of life insurance, communications by the deceased to his physician are not competent. *Shuman v. Supreme Lodge K. of H.*, 110-480.

Where the question is an action on a policy of life insurance is whether the insured consulted a physician, otherwise than as disclosed in his answers in the application, a physician may without violating the provisions of this section, testify to attending insured as a physician, and prescribing for him. Such evidence has no reference to communications between the physician and patient. *Nelson v. Nederland L. Ins. Co.*, 110-600.

But the physician cannot testify as to the advice given to his patient, because this must have been based upon information derived from the patient. The statute does not permit a disclosure of information so derived, though indirectly made. *Ibid.*

This section does not prescribe any rule of professional conduct, nor prohibit a

physician from disclosing otherwise the secrets of his patient. It relates only to the giving of testimony in a judicial proceeding, either by evidence directly given, or by affidavits, or otherwise. *Ibid.*

Facts learned by a physician while in the discharge of his duties as such cannot be testified to by him in view of the provisions of this section. *Finnegan v. Sioux City*, 112-232.

This section extends the privilege which at common law was recognized in regard to communications between client and attorney so as to cover communications between patient and physician, and extends to the latter communications the same complete protection, not only as to the physician, but also as to the patient, which at common law was recognized in regard to communications between attorney and client. Therefore the patient is privileged from disclosing communications made to his physician. *Burgess v. Sims Drug Co.*, 114-275.

While the privilege may be waived, the voluntary disclosure of such communication by the patient in cross-examination will not constitute a waiver such as to authorize the introduction in evidence of the testimony of the physician with reference to such communication. *Ibid.*

Any waiver resulting from voluntary testimony of the patient with reference to the communication must be limited to the action in which such voluntary testimony is given, and will not operate on another trial of the same case. *Ibid.*

Communications from a patient to his physician are not privileged at common law. Although there is no statutory authority for waiving the prohibition, it is settled that it may be waived by the client, and after the death of the client, by his administrator. In a criminal case, involving death of a woman by abortion, committed by the defendant, testimony of a physician who attended the woman before her death is admissible. *State v. Grimmell*, 88 N. W., 342.

There is no statute prohibiting the county attorney from calling the jury's attention to the fact that no one but the defendant himself may waive the privilege as to communication between defendant and his physician. *State v. Booth*, 88 N. W., 344.

Whenever an injured party consults a physician as physician and discloses to him his physical condition, and thus enables him to obtain information, which as an ordinary person he would not have obtained, such physician is prohibited from

testifying with reference to the knowledge thus obtained, except with the consent of the injured party. So held where a physician was called by the opposite party to whom the injured person had disclosed his physical condition for the purpose of having such physician act as a witness in his behalf. *Doran v. Cedar Rapids & M. C. R. Co.*, 90 N. W., 815.

Section applied as to communications between patient and physician. *Herries v. Waterloo*, 114-374.

### SEC. 4613. Previous conviction.

[For earlier annotations, see code, page 1841.—Ed.]

The record of a conviction for a felony is admissible although an appeal for such conviction is pending. *Hackett v. Freeman*, 103-296.

Whatever may have been the rule at common law as to proof of previous conviction as affecting the credibility and not the competency of the witness, this section limits such evidence to conviction of a felony. *Palmer v. Cedar Rapids & M. R. Co.*, 113-442.

tion as affecting the credibility and not the competency of the witness, this section limits such evidence to conviction of a felony. *Palmer v. Cedar Rapids & M. R. Co.*, 113-442.

### SEC. 4614. Moral character.

[For earlier annotations, see code, page 1841.—Ed.]

Inquiry as to the general reputation of the witness for truth and veracity should be restricted to the neighborhood of the present residence of the witness sought to be impeached, and to proof of reputation at a time near that of the trial. When residence has been so recently acquired that the neighbors of the witness are not likely to have ascertained his true character, and who in all probability has not worn off that established in the neighborhood of his former abode, evidence of his reputation at the latter place may be received, as it may also, when he has subsequently remained in no place long enough to become well known to his neighbors. *Schoep v. Banker's Alliance Ins. Co.*, 104-354; *McGuire v. Kenefick*, 111-147.

It is competent to ask a witness what is his occupation and where he resides,

although the answers to such questions may have a tendency to disgrace the witness, affect his credibility, or weaken his evidence. *State v. Chingren*, 105-169.

Before a witness can speak as to the character or reputation of another, his knowledge must appear. The mere individual opinion of the witness is not admissible. No one will be permitted to speak affirmatively to the character or competency of another, as distinguished from general reputation, solely from rumors or reports. *Lacy v. Kossuth County*, 106-16.

The general moral character of a witness, or his general reputation as to morals may be shown, not his character or life as known to the impeaching witness. *State v. SeEVERS*, 108-738.

### SEC. 4615. Whole of a writing or conversation.

[For earlier annotations, see code, page 1842.—Ed.]

The evident design of this provision is that the whole of a conversation on the same subject shall be received in order to determine the consideration and weight to be attached to that portion offered. *Walkley v. Clarke*, 107-451.

Where a part of a conversation has been

introduced in evidence, it is competent to prove the other portion as explaining the part introduced. *Hutton v. Dorsee*, 89 N. W., 79.

Section applied. *State v. Hudson*, 110-663.

### SEC. 4617. Understanding of parties to agreement.

[For earlier annotations, see code, pages 1842-3.—Ed.]

This provision is only applicable to a case where the writing involved is fairly susceptible of different meanings. *Rouss v. Creglow*, 103-60.

Where parties do not understand the agreement alike, it is, as against one of them, to be construed in that sense in which the other had reason to believe it

was understood. *Ubbinga v. Farmer's Sav. Bank*, 108-221.

This section applies to verbal contracts as well as those in writing, and it is applicable also to cases of express contract, as well as those implied. *Lull v. Anamosa Nat. Bank*, 110-537.

Where a contract issued by a building and loan association was ambiguous in its terms, held that it would be construed in the sense in which it was evidently intended to be taken by the person to whom

it was issued. *Field v. Eastern B. & L. Assn.*, 90 N. W., 717.

Section applied. *Wood v. Allen*, 111-97; *Brown v. Curtis*, 111-542.

### SEC. 4618. Historical and scientific works.

[For earlier annotations, see code, page 1848.—Ed.]

While the truths of the exact sciences, the established facts of history, and computations from fixed data may be proven by the works of reputable authorities, yet medicine belongs to the class known as inductive sciences, the data of which are constantly shifting with new discoveries, and as to matters of skill and knowledge in that science, the safer practice is to rely upon the testimony of living witness of the medical profession who may bring the

learning and research of the books within the comprehension of the jurors. *Bixby v. Omaha & C. B. R. & B. Co.*, 105-293.

Extracts from medical works, defining and giving the probable cause, progress and symptoms of a disease are not admissible in evidence. *Stewart v. Equitable Mut. L. Assn.*, 110-528.

Medical books are not admissible in evidence. *State v. Peterson*, 110-647.

### SEC. 4620. Handwriting.

[For earlier annotations, see code, pages 1844-5.—Ed.]

While the standard itself cannot be established by the testimony of persons who have seen the party write, yet the party whose signature the standard is claimed to be may establish it by his own oath. *Renner v. Thornburg*, 111-515.

Where the question was whether a certain signature, purporting to be that of the wife, was genuine or was in fact the signature of the husband afterwards altered to that of the wife, held that com-

parison with handwriting of the husband was proper. *Coppock v. Lampkin*, 114-664.

Held not error to instruct that expert evidence as to handwriting is of the lowest order of evidence, or evidence of the most unsatisfactory character. *Patton v. Lund*, 114-201.

[The reference for the case of *Bruner v. Wade*, cited in 2d column of notes on p. 1844 of Code should be "84-698" instead of "85-666."]

### SEC. 4623. Books of account—when admissible.

[For earlier annotations, see code, pages 1846-8.—Ed.]

Even where the showing necessary to entitle a party to introduce books of account in evidence has not been made, they may be admissible as showing entries in the partnership account, charging a partner with knowledge of the understanding with which funds were received. *McDermott v. Hacker*, 109-239.

Books of account held admissible to es-

tablish the manner in which the business was carried on as bearing on the question whether a partnership existed. *In re Myers' Estate*, 111-584.

Where books are not shown, by the oath of the party who kept them, to be books of original entry they are properly excluded. *Frick v. Kabaker*, 90 N. W., 498.

### SEC. 4625. Statute of frauds—contract in writing.

[For earlier annotations, see code, pages 1848-53 —Ed.]

Effect of statute. The statute of frauds does not prohibit an oral contract, nor make such agreement illegal because certain formalities are not complied with. It relates only to the method by which the proof thereof may be made. *Merchant v. O'Rourke*, 111-351.

Parol evidence is admissible to show the terms of an instrument which the law requires to be in writing, for instance, a lost antenuptial contract. *In re Devoe's Estate*, 113-4.

Notwithstanding the requirement that contracts within the provisions of the statute of frauds can only be proven by written evidence, a court of equity may on parol evidence reform a contract by adding thereto provisions which have been omitted

by mutual mistake and then specifically enforce the contract as thus reformed. *Butler v. Threlkeld*, 90 N. W., 584.

Under a general denial in an action for breach of contract of sale, plaintiff must prove his contract by written evidence, or, in lieu thereof, must prove payment or delivery, so as to bring the case within the exceptions to the next section. *Thompson v. Frakes*, 112-585.

Answering for debt of another. An oral promise to pay for the care of a person who is *non-compos mentis* is not a contract within the statute of frauds, even though the person making the promise is not legally liable for the support. *Harlan v. Harlan*, 102-701.

Where a lessor without waiving his lien permitted the lessee to remove property which was subject to the lien on the oral promise of a third person that the rent should be paid, held, that the promise of the third person was within the statute of frauds, and that the lessor had not lost his lien. *Griffin v. Hoag*, 105-499.

A verbal acceptance of an order drawn on a fund is not good unless it be shown that the drawer was the owner of the fund in the hands of the drawee or acceptor at the time the order is accepted, for unless the drawee have such fund his verbal promise to pay the debt of another is within the statute of frauds. *Winburn v. Fidelity L. & B. Assn.*, 110-374.

A promise to answer for the debt of another to be within the statute of frauds must be made to the person entitled to enforce the liability assumed by the promisor. A promise to the debtor to pay his debt and thereby relieve him from the payment of it himself is not within the statute. *Merchant v. O'Rourke*, 111-351.

When the promise, although in form to pay the debt of another, is founded on a new consideration which passes between the parties, and gives to the promisor a benefit which he did not enjoy before, and would not have possessed but for the promise, it will be regarded as an original under-

taking to which the statute of frauds has no application. *Carraher v. Allen*, 112-168.

**Creating interest in land.** A parol sale of growing trees is an executory contract, passing no title to the purchaser. A sale of growing trees, treated as a sale of an interest in realty, would be within the provision of the statute of frauds relating to the sale of an interest in realty. *Garney v. Mahoney*, 88 N. W., 828.

An oral contract creating a trust in land is not void. If the trustee refuses to perform, and the beneficiary is unable to prove the trust by written evidence, he must suffer, but if the contract is fully carried out it does not lie in the mouth of a third person to say that it is void, and therefore confers no rights. *McCormick Har. Mach. Co. v. Griffin*, 90 N. W., 84.

An oral agreement that one in possession of property shall surrender it on an adjudication against his claim in another case is within the statute of frauds. *East Omaha Land Co. v. Hansen*, 90 N. W., 705.

In such case continuance in possession by the claimant will not take the case out of the statute under the next section. *Ibid.*

Section applied as to a contract creating an interest in real property. *Gregory v. Bowsby*, 88 N. W., 822.

### SEC. 4626. Exceptions.

[For earlier annotations, see code, pages 1853-5.—Ed.]

**Labor or money to be expended.** A contract for the sale of corn to be shelled, that unfit for shelling to be thrown out, is not within the exception of the statute of frauds as to cases where labor, skill or money is necessary to be expended in producing or procuring the property. In such case the work to be done is not of a kind to change either the form or character of the thing sold. *Lewis v. Evans*, 108-296.

Merely preparing a crop for the market is not labor and expense in producing or procuring it such as to take an oral contract for the sale thereof out of the statute of frauds. *Mighel v. Dougherty*, 86-480; *Dierson v. Petersmeyer*, 109-233.

**Taking possession.** In order that the act of the vendee in taking possession of the property shall be such as to bring the case within the exception of the statute of frauds it must appear that the possession was taken in pursuance of the contract. *Benedict v. Bird*, 103-612.

The exception of the statute relating to the payment of the purchase price applies only to cases where "the purchase money or any portion thereof has been received by the vendor." *Ibid.*

To constitute such delivery of personal property as to take an oral contract for the sale thereof out of the statute of frauds it is necessary not only that the vendor act with the purpose of vesting the right of

possession in the vendee, but that the vendee accept with the intention of taking possession as owner. *Dierson v. Petersmeyer*, 109-233.

If one is already in possession of land under a contract of lease, his continuance in that possession will not be sufficient to support a claim of part performance under a subsequent contract of purchase. The possession, to take the contract out of the statute of frauds, must be exclusively referable to the contract. *Hutton v. Doxsee*, 89 N. W., 79.

Taking of possession, to render valid an oral contract to convey, must be with actual or implied consent of the grantor, and by virtue of the contract. *Lowery v. Lowery*, 89 N. W., 1118.

**Part performance.** An oral agreement to transfer real property to another in consideration that the latter will furnish support for a dependent person, is taken out of the statute of frauds by the furnishing support as agreed and can be specifically enforced. *Harlan v. Harlan*, 102-701.

Part payment, or taking possession under an oral contract, will render the contract binding. *Walkley v. Clarke*, 107-451.

An oral agreement between husband and wife by which the husband abandons the advantage of an antenuptial contract with reference to the wife's interest in the husband's real property, in consideration of

the discontinuance of a meritorious suit for divorce and the resumption of the marriage relations is valid, notwithstanding the statute of frauds. *Fisher v. Koontz*, 110-498.

A promise or agreement to make a will for the transfer of an interest in land in another's favor may be taken out of the statute of frauds by the payment of a consideration. *Bird v. Jacobus*, 113-194.

Contracts within the statute of frauds are not void, and if performed, or partly performed, they are to the extent of such performance taken out of the statute. *Murphy v. DeHaan*, 89 N. W., 100.

Where the contract, although within the statute of frauds, is for labor to be performed, and plaintiff has partly or wholly executed the same on his part, the terms of the contract govern as to the rate of compensation. *Ibid.*

**Pleading.** Where the defendant by pleading raises the objection of the statute of frauds and the plaintiff alleges facts bringing the case within an exception in the statute, the defendant does not waive his defense by failing to object to the evidence of the contract offered, before it appears whether plaintiff can establish the fact of the exception. *Benedict v. Bird*, 103-612.

#### SEC. 4628. Party made witness.

[For earlier annotations, see code, page 1855.—Ed.]

Inasmuch as an oral contract, although within the statute of frauds, may be established by the testimony of the party, a recognition by him of the contract is suffi-

cient to make a release from its obligation operative as a consideration for a new agreement. *Merchant v. O'Rourke*, 111-351.

#### SEC. 4630. Record or certified copy of instrument.

[For earlier annotations, see code, page 1856.—Ed.]

The loss of the original need not be shown in order to justify the reception of certified copies of the record. Proof by the

party on oath, or otherwise, that the original is not within his control, is sufficient. *Hall v. Cardell*, 111-206.

#### SEC. 4635. Copies of records and entries in public offices.

[For earlier annotations, see code, pages 1857-8.—Ed.]

In a particular case, held, that it was sufficiently shown that deeds and plat, the records of which were introduced in evidence did not belong to the party introducing such records and were not within

his control. *Independent Sch. Dist. v. Hewitt*, 105-663.

Certified copies of records in a public office are entitled to the same weight as the originals. *Traer v. State Board of Medical Examiners*, 106-559.

#### SEC. 4644. Judicial record—of state or federal court.

[For earlier annotations, see code, page 1859.—Ed.]

A judgment may be proved by the record book, or a certified transcript thereof. *Baxter v. Pritchard*, 113-422.

#### SEC. 4648. Presumption of regularity.

[For earlier annotations, see code, pages 1860-1.—Ed.]

A situation will not be presumed, in the absence of proof, to defeat the acts of an officer apparently clothed with authority in discharging duties imposed upon him by statute. *Miller Brewing Co. v. Capital Ins. Co.*, 111-590.

When an inferior tribunal is authorized to determine a question of fact, its finding is an adjudication which cannot be impeached collaterally. *Oliver v. Monona County*, 90 N. W., 510.

A finding necessarily involved in the adjudication of an inferior tribunal will be presumed to exist, although not appearing of record, if there is no requirement that a record thereof be made. *Ibid.*

A presumption of truth attaches to the record of an officer showing the filing of a paper authorized to be filed in his office. *McConkie v. District Court*, 90 N. W., 715.

Section applied: *Thompson v. Thompson*, 90 N. W., 493.

#### SEC. 4649. Executive acts.

A proclamation by the governor may be proved by the record thereof in the office

of the secretary of state. *McPeck v. Western U. Tel. Co.*, 107-356.

#### SEC. 4650. Proceedings of legislature.

[For earlier annotations, see code, page 1861.—Ed.]

There may be cases in which statutes of another state when relied upon must be

pleaded, but where they are relied upon merely as evidence of ultimate facts it is

not necessary that they be pleaded directly, *Green v. Equitable Mut. L. & End. Assn.*, the pleading of the fact being sufficient. 105-628.

#### SEC. 4658. Subpœnas for witnesses.

Pendency of some proceeding in a court is necessary to warrant the issue of process for witnesses. *Chambers v. Oehler*, 107-155.

#### SEC. 4661. Witness fees.

[For earlier annotations, see code, page 1864.—Ed.]

When a witness is called and sworn and has thus placed himself under and subject to the order and direction of the court, he is entitled to fees for his attendance, but where a witness is present without being subpœnaed, solely at the risk of a party, and is not sworn, the party who calls him

is alone responsible for his fees. Generally speaking, a witness is one who gives evidence in a court. *Fisher v. Burlington, C. R. & N. R. Co.*, 104-588.

Witnesses who are not subpœnaed are not entitled to mileage. *Ibid.*

#### SEC. 4662. Fees in advance.

[For earlier annotations, see code, page 1865.—Ed.]

A witness for defendant in a criminal prosecution is not bound to attend without prepayment of fees, unless the subpœna is

issued under the order of the judge as provided in Code § 1298. *State v. Keenan*, 111-286.

#### SEC. 4668. Failure to obey subpœna—pleading taken as true.

[For earlier annotations, see code, page 1865.—Ed.]

In the absence of a showing of want of personal knowledge, a request for judgment on account of failure of the opposite party to produce books and papers as required by

statute, by order of the court, should not be granted. *Devier v. Economic L. Assn.*, 106-682.

#### SEC. 4673. Affidavits—before whom made.

[For earlier annotations, see code, page 1866.—Ed.]

In a proceeding before the board of medical examiners for revocation of a license, affidavits may be received as evidence.

*Traer v. State Board of Medical Examiners*, 106-559.

#### SEC. 4675. How compelled.

A justice of the peace cannot issue a subpœna for the purpose of requiring the making of an affidavit where no proceeding is

pending before him. *Chambers v. Oehler*, 107-155.

#### SEC. 4680. Publications—how proved.

[For earlier annotations, see code, page 1867.—Ed.]

Section applied: *McConaughy v. Wilsey*, 88 N. W., 1101.

#### SEC. 4684. Depositions—when taken and by whom.

[For earlier annotations, see code, page 1868.—Ed.]

Where depositions are taken upon notice, such notice must contain the name of the witness. *Harlan v. Richmond*, 108-161.

#### SEC. 4700. Certificate.

[For earlier annotations, see code, pages 1873-3.—Ed.]

A party to an action may have the right to demand the production of an original instrument which his adversary seeks to

prove, notwithstanding the fact that a copy of it is attached to a deposition introduced in evidence. *Ruthven v. Clarke*, 109-25.

#### SEC. 4702. Taking in shorthand.

When depositions are taken in shorthand under statutory provisions, the notes may be signed by the witness, after being read

over to him, and it is not necessary that the witness sign or swear to the translation of the notes. *Stocum v. Brown*, 105-209.

**SEC. 4707. Opened—custody.**

[For earlier annotations, see code, page 1874.—Ed.]

Depositions, although not used by the party taking them are part of the record, and if removed by him without leave may be required to be returned. *Haines v. Mutual Reserve Fund L. Assn.*, 88 N. W., 338.

**SEC. 4712. Exceptions.**

[For earlier annotations, see code, pages 1875-6.—Ed.]

A party cannot be permitted to pick from a deposition taken at his instance those portions favorable to himself and omit the balance. He should either read all of that which is pertinent to the issues, or none. When the deposition is offered by the opposite party, such parts may be received as relate to any distinct transaction, but must include all said on the particular subject. It follows that after the deposition has been introduced by the party taking it he will not be permitted to withdraw a part, such as the cross-examination, without withdrawing the entire deposition, nor will he be allowed to withdraw the whole for the purpose of re-reading a part only. *Walkley v. Clarke*, 107-451.

Under this section secondary evidence is not to be deemed objectionable as incompetent. *Matthews v. Luers Drug Co.*, 110-231.

The objection that interrogatories are not proper cross-examination and are incompetent, irrelevant and immaterial, and that the witness had not qualified himself to express the opinions asked for in all the interrogatories, should be overruled when not made before the case is reached for trial. *Cathcart v. Rogers*, 87 N. W., 738.

PART FOURTH.

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CODE OF CRIMINAL PROCEDURE.

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TITLE XXIV.

OF CRIMES AND PUNISHMENT.

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CHAPTER 2.

OF OFFENSES AGAINST THE LIVES AND PERSONS OF INDIVIDUALS.

**SECTION 4727. Murder.**

[For earlier annotations, see code, pages 1879-81.—Ed.]

The unlawful administering of poison with bad motive or intent constitutes murder if death ensues, but it is immaterial whether or not there is a specific intent to kill, and an indictment charging death caused in such manner is not defective for failure to allege such specific intent to kill. *State v. Van Tassel*, 103-6.

If the injuries inflicted by the defendant contributed to produce a diseased condition, from which death resulted, the defendant is criminally responsible for the resulting death, if the acts were criminal. *State v. Wood*, 112-411.

An indictment for killing a person named is not insufficient because it appears on the introduction of the evidence that the person named was in fact an unnamed bastard, the name given it by the grand jury being

a combination of the names of the parents. *State v. Cunningham*, 111-233.

Under the facts of a particular case, held, that defendant had not been so pressed by his assailant as to be justified in using a pocket-knife in such a way as to be likely to cause death. *State v. Copeland*, 106-102.

Evidence of intoxication is admissible as bearing on the question of whether defendant was capable of forming an intent to assist another in an assault resulting in homicide. *State v. Dorland*, 103-168.

Evidence in a particular case held sufficient to establish *corpus delicti* in a prosecution for murder. *State v. Novak*, 109-717.

Evidence and instructions in a particular case considered. *State v. Wright*, 112-436.

**SEC. 4728. First degree.**

[For earlier annotations, see code, pages 1882-3.—Ed.]

Evidence that defendant went into an affray by previous agreement with another for the purpose of rendering assistance and stood by while the fatal blow was inflicted, held, to tend to show deliberation, premeditation and malice. *State v. Jackson*, 103-702.

An indictment charging that defendant committed an assault with a deadly weapon upon the deceased, and with specific intent to kill and murder the deceased, wilfully, feloniously, deliberately, premeditatedly and

with malice aforethought did shoot off and discharge, etc., thereby wilfully, etc., inflicting upon the body of the deceased a mortal wound, etc., is sufficient. *State v. McPherson*, 114-492.

No particular length of time of premeditation or deliberation is required, and an instruction that if "either at some time before or in the moment or instant of time immediately before" the fatal shot was fired the defendant had formed in his mind a wilful, deliberate and premeditated design

or purpose of his malice aforethought to take the life of the deceased, held not to be erroneous. *Ibid.*

Where the killing is charged to have been wilful, deliberate and premeditated, it is not essential that the indictment charge the assault to have been wilful. *State v. Dunn.*, 89 N. W., 984; *State v. Gray*, 89 N. W., 987.

Indictment for murder in the first degree held sufficient. *State v. Wood*, 112-411.

It is not improper to charge the assault as having been made with a deadly weapon, the particular description of which is to the grand jury unknown, although the weapon with which it is claimed the crime was committed was before the grand jury

and also introduced in evidence on the trial. *State v. Sigler*, 114-408.

There can be no state of evidence that will warrant conviction for murder in the second degree where the defendant has committed the crime by means of poison. *State v. Bertoch*, 112-195.

Every one is presumed to have intended the natural consequences flowing from his own acts, and the guilt of defendant of any particular degree of murder or of manslaughter is to be determined by the jury, and not by the court, unless some of the essential elements of the act constituting the crime of a particular degree are not proven. *State v. Wood*, 112-411.

### SEC. 4729. Second degree.

[For earlier annotations, see code, page 1883.—Ed.]

Where, in a prosecution for murder, it clearly appears that death was due to an attempt to procure an abortion, evidence of an unsuccessful attempt on the part of the female to get drugs for the same purpose, is not admissible. *State v. Gunn*, 106-120.

**SEC. 4750-a. Advise, counsel, encourage, advocate or incite murder—penalty.** Whoever shall within this state advise, counsel, encourage, advocate or incite the unlawful killing within or without the state of any human being where no such killing takes place shall be punished by imprisonment in the state penitentiary for not more than twenty years. [29 G. A., ch. 143, § 1.]

**SEC. 4750-b. Kidnapping for ransom—penalty.** That whoever kidnaps, takes or carries away any person, or decoys or entices such person away from any place in this state for the purpose of or with the intention of receiving or securing from any one any money, property or thing of value as a ransom, reward or price for the return of the person so kidnapped, taken, carried, decoyed or enticed away, as aforesaid, or whoever shall imprison, detain or hold any person at any place in this state for the purpose or with the intent of receiving or securing from any one money, property or thing of value as a ransom, reward or price for the return, liberation or surrender of the person so imprisoned, detained or held, shall be deemed to be guilty of the crime of kidnapping for the purpose of ransom, and upon conviction thereof shall be imprisoned in the penitentiary during life, or for any fixed term of years not less than ten years. [29 G. A., ch. 142, § 1.]

**SEC. 4750-c. Other statutes not affected.** This act shall not be held or deemed to repeal or affect in any manner sections four thousand seven hundred and sixty (4760), four thousand seven hundred and sixty-one (4761) and four thousand seven hundred and sixty-five (4765) of the code. [29 G. A., ch. 142, § 2.]

### SEC. 4751. Manslaughter.

[For earlier annotations, see code, pages 1886-7.—Ed.]

Neither motive nor intent is necessarily an element of the crime of manslaughter, and where it appeared that defendant had gone into an affray for the purpose of assisting another, held, sufficient to show defendant's guilt. *State v. Jackson*, 103-702.

One may be guilty as accessory before the

fact of the crime of manslaughter. *State v. Gray*, 89 N. W., 987.

Evidence in a particular case held sufficient to sustain a conviction of an officer for manslaughter in causing the death of a prisoner. *State v. Phillips*, 89 N. W., 1092.

### SEC. 4753. Robbery.

[For earlier annotations, see code, page 1887.—Ed.]

An instruction defining this offense as "larceny of property from the person of the owner, accompanied by violence or put-

ting in fear," is not erroneous. *State v. Osborne*, 89 N. W., 1077.

**SEC. 4756. Rape.**

[For earlier annotations, see code, pages 1888-90.—Ed.]

**What constitutes.** Under a charge of rape in the usual form, evidence is admissible to show that the prosecutrix was feeble-minded. Such evidence bears upon the question of consent and it is not necessary that the indictment be framed under the special provisions of Code § 4758 with reference to the crime as committed against a person of feeble mind. *State v. McDonough*, 104-6.

If there is no evidence of penetration the issue as to whether defendant is guilty of rape ought not to be submitted to the jury, but evidence that in case of a girl of tender years the defendant did his utmost to accomplish his purpose, together with evidence concerning injury to the victim, may be sufficient to warrant a submission of the issue to the jury. *State v. Carnagy*, 106-483.

**Age of consent.** Proof of consent is immaterial where the unlawful connection is had with a female under the age of consent. *State v. Bailor*, 104-1.

Inasmuch as connection with a female child under the age of consent is here made to constitute the crime of rape, regardless of any consent on the part of the child, the attempt to have such connection will constitute an assault with intent to commit rape, even though there was no resistance whatever and the defendant expected to accomplish his purpose without opposition. *State v. Carnagy*, 106-483.

A female under the age of consent as fixed by statute cannot consent to sexual intercourse nor can she assent to an assault for that purpose. *State v. Sherman*, 106-684.

Evidence in a particular case held sufficient to sustain a conviction of rape in having connection with a child eight years of age. *State v. Steffens*, 89 N. W., 974.

**Evidence.** The rejection of expert evidence as to the possibility of having carnal connection under certain circumstances, held, to be error without prejudice where the conviction was only for assault with intent to commit rape. *State v. Taylor*, 103-22.

In prosecutions for rape the character of the prosecutrix must be proved by evidence of general reputation; particular acts

or specific facts are not admissible. *State v. McDonough*, 104-6.

Complaints made at the time by the prosecutrix relating to her condition and not to the details of the assault may be shown. *State v. Baker*, 106-99.

The complaint of the injured female is not admissible solely because a part of the *res gestae* as a fact tending to corroborate the evidence of the witness. Lapse of time is not, therefore, the sole test in determining the admissibility of proof of such complaint, but the inference arising against the truth of the charge from silence is a matter for the consideration of the jury in determining the weight to be attached to it. *State v. Peterson*, 110-647.

It is permissible for the state to give in evidence complaints made by the prosecutrix to the effect that defendant assaulted or ravished her, and such testimony is not objectionable as constituting a narrative of facts. The exact particulars stated by her cannot be narrated, but the fact regarding which complaint is made may be stated. *Ibid.*

The education and mental ability of the prosecutrix, whose complaints are proven, may be shown, and she may be allowed to testify as to exhibiting the clothing she had on at the time of the ravishment, such clothing being produced at the trial and introduced in evidence. *Ibid.*

The jurors' attention may be directed to the fact that a failure of prosecutrix to make complaint is a circumstance tending to discredit her story. *State v. Wolf*, 112-458.

It is not competent for medical experts to testify that the crime of rape cannot be committed upon an ordinary mature female. Such evidence is in usurpation of the functions of the jury, and the matter inquired about is not the subject of expert evidence. *State v. Peterson*, 110-647.

It is for the jury to determine whether, in view of the age and mental condition of the prosecutrix she offered that resistance to the assault which precluded the idea of consent. *Ibid.*

**Punishment.** In a particular case held that a sentence of twenty-five years' imprisonment was excessive, and the sentence was reduced to eight years. *Ibid.*

**SEC. 4757. Compelling to marry or be defiled.**

[For earlier annotations, see code, page 1890.—Ed.]

As to corroboration, see Code § 5488 and notes.

**SEC. 4758. Carnal knowledge of imbecile or insensible female.**

[For earlier annotations, see code, page 1890.—Ed.]

It is not necessary, where carnal connection with an imbecile or idiot is charged, to allege force and violence, and such an

allegation may be treated as surplusage. *State v. Austin*, 109-118.

**SEC. 4759. Attempt to produce miscarriage.**

[For earlier annotations, see code, pages 1890-1.—Ed.]

In a prosecution for murder in causing the death of a female in an attempt to procure an abortion, evidence that the female herself unsuccessfully attempted to procure a drug for that purpose, is not admissible. *State v. Gunn*, 106-120.

It is not necessary in an indictment for administering a drug to a pregnant woman with intent to produce miscarriage to set out the manner of administering the drug, nor the form in which the drug is administered. *State v. Moothart*, 109-130.

One may be guilty of administering a drug where he causes or procures the pregnant woman herself to take the drug with a wrongful intent. *Ibid.*

Letters of the accused to the woman may be competent as tending to show the relation of the parties as bearing upon the intent with which the defendant acted, and for that purpose letters written after the attempt may be admissible. *Ibid.*

The production of a miscarriage is not essential to the crime, and there may be a conviction on evidence of the administering of the drug with a wrongful intent, although the quantity administered was not such as would produce the intended effect. *Ibid.*

The indictment should negative the statutory exception of cases where a miscarriage is necessary to save the life of the woman. *State v. Aiken*, 109-643.

Accordingly, the burden of proving that the case is not within the exception is upon the state, and there should not be a conviction unless the jury are satisfied beyond a reasonable doubt that the miscarriage produced by defendant was not necessary to save the woman's life. *Ibid.*

Evidence held sufficient to support a conviction under this section. *State v. Lee*, 113-348.

**SEC. 4762. Seduction.**

[For earlier annotations, see code, pages 1891-4.—Ed.]

**What constitutes.** Where by reason of former friendship and caresses, flattery and false assurances, the defendant induced the prosecutrix, a girl of seventeen years of age, to submit, held, that there were sufficient seductive arts to sustain a conviction. *State v. Hayes*, 105-82.

To induce intercourse by a promise to marry the prosecutrix if anything goes wrong may constitute seduction. Whether a woman of chaste character would yield her person under such circumstances and whether the act in question was voluntary and to gratify desire rather than because of such conditional promise, may be considered in connection with all the facts and circumstances shown upon the trial, but it cannot be considered as a matter of law that an unsophisticated country girl of seventeen years, when addressed by a young man five or six years her senior, would necessarily be of previous unchastity in yielding on the strength of such a promise or that she submitted as the result of passion rather than the false promise of the accused. *State v. Hughes*, 106-125.

Deception is an essential element of the crime. It consists in inducing, by any kind of deception, an unmarried woman of chaste character to part with her virtue and yield to the embraces of the deceiver. If she submits without being in some way deceived into doing so there is no seduction. Proofs of promise and inducement are competent for the purpose of determining whether there was deception, but if they were not false they could not deceive, and could not constitute seduction. It is therefore error to instruct the jury that if complainant yielded her person by reason of

some promise or inducement, held out to her by the defendant, or an account of defendant's visits and attentions, the defendant may be convicted. *State v. Hamann*, 109-646.

In a particular case held that an instruction was erroneous in directing the jurors that the kind and character of the arts, promises and deception were of secondary importance, and that the manner in which the ruin of the prosecutrix was accomplished was of no importance. In such case the vital question of defendant's guilt depends upon the circumstances under which the prosecutrix yielded her person to him, and it is of equal importance that the promises relied upon be shown to have been false and therefore deceptive. *State v. Coffman*, 112-8.

Promise of marriage constitutes sufficient fraud and artifice to support a conviction for the offense where it appears that the prosecuting witness yielded in reliance thereon. *State v. Mulholland*, 88 N. W., 325.

Indictment for seducing "one Mary Roll, an unmarried person," etc., held sufficiently charged the seduction of an unmarried woman. *State v. Olson*, 108-667.

In an indictment defining seduction held that the inadvertent use of "artificial" for "artifice" was not such a mistake as to constitute prejudicial error. *State v. Hamann*, 113-367.

**Evidence.** It appearing that about the time of the alleged seduction prosecutrix was receiving attention from another man, held, that the court properly limited the evidence of the relations of prosecutrix to such other person to the time preceding and contemporaneous with the alleged se-

duction and excluded evidence of subsequent relations. *State v. Abeggan*, 103-50.

It is error to permit a witness to state over defendant's objection that the neighbors and others said that they had heard that the prosecutrix was engaged to marry the defendant. *State v. Reilly*, 104-13.

Unchaste conduct after the time of the alleged seduction cannot be considered. *State v. Wycoff*, 113-670.

Evidence in a particular case held sufficient to show that intercourse was secured by a promise of marriage. *Ibid.*

A statement by a witness not an expert, and made by way of conclusions from facts stated by her is not admissible to show that the prosecutrix was already with child at the time of the alleged seduction. *State v. Reinheimer*, 109-624.

Evidence of the general reputation of the prosecutrix as to chastity is not admissible in behalf of the defendant. *Ibid.*

But after defendant has introduced evidence tending to show the unchastity of

prosecutrix, the state may sustain her character by proof of her general reputation in the community in which she lived. *Ibid.*

Evidence in a particular case, held, not sufficient to sustain a verdict of guilty of the crime of seduction. *State v. Thomas*, 103-748.

Evidence in a particular case held sufficient to sustain a conviction for seduction. *State v. Olson*, 108-667.

Previous chastity. Proof of grossly indecent remarks made in the presence of prosecutrix by other men than defendant held competent, coupled with evidence as to whether such remarks caused indignation on her part, or otherwise, as bearing on the question of her previously chaste character. *State v. Bige*, 112-433.

Evidence is admissible tending to prove that the prosecutrix had before her alleged seduction uniformly associated with men of bad character. *Ibid.*

#### SEC. 4764. Desertion after seduction and marriage.

This section is not unconstitutional because of want of uniformity in its application. *Morris v. Stout*, 110-659.

#### SEC. 4767. Malicious threats to extort.

[For earlier annotations, see code, page 1895.—Ed.]

Such provision is not limited to a case where the person accused is innocent of the crime with which he is threatened to be accused. It is the malicious threat to accuse with intent to extort money, etc., which is made criminal and the guilt or innocence of the crime specified in the threat is wholly immaterial. *State v. Debolt*, 104-105.

Proof of a specific intent in such case is necessary and such intent cannot be presumed from maliciously and feloniously threatening to accuse without just cause or excuse. *Ibid.*

An indictment for malicious threats with

intent to extort by charging another with the commission of a crime is sufficient without alleging that the person so threatened was not guilty of the crime threatened to be charged. *Kennedy v. Roberts*, 105-521.

It is not necessary that the act which defendant sought to compel the prosecuting witness to commit by means of threats be an act which, if consummated, would be a crime. *State v. Todd*, 110-631.

This section has no application to a United States pension examiner charged with the duty of investigating fraudulent pension claims. *In re Waite*, 81 Fed., 359.

#### SEC. 4768. Assault with intent to murder.

[For earlier annotations, see code, pages 1895-6.—Ed.]

The crime of assault with intent to commit murder may be charged in general terms. Malice aforethought need not be averred. Nor is it necessary to state the instrument or means used to effectuate the

purpose. And, held, that an indictment charging the assault as made with a revolver by discharging it was sufficient without alleging that the revolver was loaded. *State v. Shunka*, 89 N. W., 977.

#### SEC. 4769. With intent to commit rape.

[For earlier annotations, see code, page 1896.—Ed.]

An assault with intent to have connection with a female child under the age of consent will constitute an assault with intent to commit rape, although no resistance whatever was made and defendant expected to accomplish his purpose without opposition. *State v. Carnagy*, 106-483.

A female under the age of consent cannot consent to sexual intercourse; and as

actual sexual intercourse with such female child constitutes rape, so the attempt to have such intercourse constitutes assault with intent to commit rape, regardless of the consent of the female. *State v. Sherman*, 106-684.

Where defendant was on trial for an assault with intent to commit rape by having connection with a girl under the age of

consent, held that evidence of his conduct in the same transaction towards other girls was admissible against him. *State v. Desmond*, 109-72.

Unless the indictment charges that the assault was accompanied with force, it is not proper to instruct the jury with refer-

ence to assault and battery, as an offense included in that of assault with intent to commit rape. *Ibid*.

It is sufficient to charge that the defendant made an assault with intent, etc., without specifying the manner of such assault. *State v. Johnson*, 114-430.

#### SEC. 4771. With intent to inflict great bodily injury.

[For earlier annotations, see code, pages 1896-7.—Ed.]

It is erroneous to charge that whoever assaults another with intent to inflict upon such person some injury of a more grave and serious character than an ordinary battery is guilty of an assault with intent to inflict a great bodily injury, for such charge

overlooks a material ingredient of the offense, to-wit: the unlawfulness of the assault. *State v. Shea*, 104-724.

Evidence in a particular case considered with reference to the charge of this offense. *State v. Bysong*, 112-419.

#### SEC. 4772. With intent to commit any felony.

[For earlier annotations, see code, page 1897.—Ed.]

The indictment must specify the felony with intent to commit which the assault is made, and the court in its instructions to the jury should require the verdict to specify the specific offense of which the de-

fendant is charged. *State v. Austin*, 109-118.

Evidence in a particular case held sufficient to sustain a conviction of assault with intent to commit manslaughter. *State v. Schwab*, 112-666.

### CHAPTER 3.

#### OF OFFENSES AGAINST PROPERTY.

#### SECTION 4776. Burning inhabited dwelling in nighttime.

[For earlier annotations, see code page 1899.—Ed.]

Where the burning of a building was established by direct evidence, held, that circumstantial evidence was sufficient to prove the *corpus delicti*, that is, that the building was feloniously set on fire. *State v. Millmeier*, 102-692.

If there is an actual ignition, and the fiber of the wood, or other destructible material of the house is charred and thus destroyed even in a small part, the crime is complete. *State v. Spiegel*, 112-701.

#### SEC. 4780. Burning mills, locks, dams, depots, etc.

[For earlier annotations, see code, page 1899.—Ed.]

Indictment in a particular case, held, to show a crime under this section and not un-

der the section following. *State v. Spiegel*, 112-701.

#### SEC. 4787. Burglary.

[For earlier annotations, see code, pages 1901-2.—Ed.]

It is sufficient in an indictment for burglary to allege the breaking and entering "with the intent then and there to commit a public offense, to-wit, robbery." It is not necessary to set out in detail the elements of the crime charged to have been intended. *State v. Watson*, 102-651.

liberties with a female sleeping therein. *State v. Worthen*, 111-267.

Proof of occupancy is sufficient to establish an allegation of ownership in a prosecution for burglary. *State v. Watson*, 102-651.

The presumption may be indulged that one who enters a building unbidden during the night time does so with the object of stealing, although he escapes without taking anything, and in a particular case held that such presumption was not conclusively rebutted by evidence that while in the building he attempted to take personal

One who knows that the crime of burglary is contemplated against him may remain silent and permit matters to go on for the purpose of apprehending the criminal without being held to have assented to the act. The fact that the agent of the owner has permitted a detective to take a cast of the key to the premises, from which the criminal has been able to manufacture

a key with which he enters will not constitute consent on the part of the owner such as to prevent a conviction of the wrongdoer. *State v. Abley*, 109-61.

Evidence in a particular case held sufficient to sustain a conviction. *State v. Ryan*, 113-536.

**SEC. 4790. Possession of burglar's tools.** If any person be found having in his possession at any time any burglar's tools or implements, with intent to commit the crime of burglary, he shall be imprisoned in the penitentiary not more than five years, or be fined not exceeding \$500.00 and imprisoned in the county jail not more than one year. The court before whom such conviction is had shall order the retention by the sheriff of such tools or implements, to be used in evidence in any court in which such person is tried for the offense herein defined, or that of burglary, and the possession of such tools or implements shall be presumptive evidence of his intent to commit burglary. [15 G. A., ch. 13.] [29 G. A., ch. 144, § 1.]

**SEC. 4791. Other breakings and enterings.**

[For earlier annotations, see code, page 1903.—Ed.]

Where an indictment charging the breaking and entering a building in the night time, alleges the ownership of the building and the larceny of goods found therein, it is sufficient, without a more particular allegation that the building was one in which goods, merchandise or other valuable things were kept for use, sale or deposit, as specified by statute. *State v. Burns*, 109-436.

In such case evidence of actual possession, by the owner of the building, of the property stolen is sufficient proof of ownership. *Ibid.*

It is the building itself, and not any particular room thereof set apart to a special

purpose the breaking and entering of which constitutes the crime. *Ibid.*

An indictment charging the breaking and entry of "the certain planing mill of" a person named, situated etc., is sufficient to charge the breaking and entry of a building. The term "planing mill," without modification or qualification, would properly be understood to include a building and machinery therein used in doing the work of planing mills. The fact that the indictment charges that goods, wares and valuable things were kept in such planing mill, and that defendant did break and enter the mill, would tend to support this meaning of the term. *State v. Haney*, 110-26.

## CHAPTER 4.

### OF MALICIOUS MISCHIEF AND TRESPASS.

**SECTION 4807. To highways, bridges, railways, telegraph lines, etc.** If any person maliciously injure, remove or destroy any electric railway or apparatus thereto belonging, or any bridge, rail or plank road; or place or cause to be placed any obstruction on such bridge or road; or wilfully obstruct or injure any public road or highway; or maliciously cut, burn or in any way break down, injure or destroy any electric light, electric railways, telephone, electric light or telegraph post, or in any way cut, break or injure the wires or any apparatus thereto belonging, he shall be imprisoned in the penitentiary not more than five years, or be fined not exceeding five hundred dollars and imprisoned in the county jail not exceeding one year. [C. '73, § 3979; R., § 4320; C. '51, § 2680.] [28 G. A., ch. 126, § 1.] [29 G. A., ch. 145, § 1.]

[For annotations, see code, page 1905.—Ed.]

**SEC. 4808. Obstructing or defacing roads.** If any person, without authority or permission from the board of trustees, shall in any manner obstruct, deface or injure any public road by breaking up, plowing or digging within the boundary lines thereof, he shall be fined not less than five nor more than twenty-five dollars, or be imprisoned in the county jail not more

than thirty days, at the discretion of the court. [15 G. A., ch. 17.] [29 G. A., ch. 53, § 16.]

[For annotations, see code, page 1906.—Ed.]

**SEC. 4810-a. Train robbery—penalty.** That if any person shall stop, or attempt to stop any railway passenger train, with intent to rob any person thereon, or to rob any coach attached thereto, or to rob any mail-pouch, express safe, or box on such train; or shall wreck or attempt to wreck, derail, or attempt to derail, any such train, by any means whatever, with intent to commit such robbery; or shall obstruct or detain such train, or any locomotive, tender, coach, or car attached thereto, with such intent, or shall place upon any railway track, or under any engine, tender, coach, or car any explosive substance, with intent to obstruct, stop, detain, derail, or wreck such train, for the purpose of committing such robbery, or remove any spike, fish-plate, frog, rail, switch, tie, stringer, or appliance used on such railway with intent to obstruct, stop, detain, derail, or wreck such train for the purpose of committing such robbery; or shall enter any locomotive, tender, coach, or car attached to such train, and take or attempt to take possession thereof, for the purpose of committing such robbery; or shall rifle any coach, car, safe, box, or mail-pouch on such train; or shall with force and arms take and carry away any valuable thing whatever from such train, or from any person thereon; or shall intimidate, injure, wound, or maim any person thereon, with intent to commit such robbery, he shall, upon conviction thereof, be imprisoned in the penitentiary at hard labor, for life, or for any term not less than ten years. [28 G. A., ch. 127, § 1.]

**SEC. 4818. Injuries to beasts.**

[For earlier annotations, see code, page 1908.—Ed.]

Under this section the act of exposing a poisonous substance with intent that the same be taken by a domestic animal must be charged to have been maliciously done. *State v. Lightfoot*, 107-344.

## CHAPTER 5.

### OF LARCENY AND RECEIVING STOLEN GOODS.

**SECTION 4831. Larceny defined.**

[For earlier annotations, see code, pages 1911-15.—Ed.]

**Felonious taking.** It is not error necessitating a reversal that the court does not in the instructions defining the offense make use of the word "felonious" as qualifying the intent with which the act is done. All the instructions are to be taken together and if the intent is elsewhere sufficiently described, the defendant cannot complain. *State v. Minor*, 106-642.

**Ownership.** An indictment which alleges ownership of the property in a corporation without alleging the fact of its incorporation will not be fatally defective. *State v. Fogarty*, 105-32.

The taking at one time of property belonging to different persons severally and not jointly constitutes but one offense of larceny. The fact that the indictment lays the ownership of the property in the owners jointly, instead of severally, will not be fatal. *State v. Congrove*, 109-66.

**What property.** One who as a trespasser goes upon the land of another and transfers bees from a tree growing thereon to a gum belonging to a third person acquires by his wrongful act no title in the bees, and a person who takes them from the premises on which they have been left by the trespasser is not guilty of larceny of the property of the trespasser. *State v. Repp*, 104-305.

The term "chattels," as here used to describe the property which is subject of larceny, includes a dog. *Hamby v. Samson*, 105-112.

Fence wire, attached to posts and forming a fence, is a part of the realty, and the unlawful taking thereof is not larceny. *Murphy v. Olberding*, 107-547.

Where one of two adjoining land owners took fence wire from posts with which it constituted a division fence, and attached

it to other posts, where it served the same purpose, held that there was an absence of evidence of intent to convert such as is necessary to constitute larceny. *Ibid.*

**Indictment.** In an indictment for larceny of money, held sufficient to describe the property as "twenty-two dollars and fifty cents in lawful money of the United States of the value of twenty-two dollars and fifty cents." *State v. Fisher*, 106-658.

It is not necessary to allege the value of a certain number of dollars of money which the defendant is charged with embezzling. *State v. Alverson*, 105-152.

Evidence in a particular case held sufficient to sustain a conviction for larceny. *State v. Newhouse*, 88 N. W., 353.

An instruction as to reasonable doubt with reference to whether the value of the property exceeds twenty dollars is not necessary where the evidence shows without conflict, and it is practically conceded, that

the value of the goods exceeds twenty dollars. *State v. Burton*, 103-28.

**Recent possession.** The claim of a purchase from strangers is one very commonly made by those found in possession of stolen property and though the evidence is undisputed yet the extreme improbability of such a transaction may be considered by the jury in passing upon the truth of the evidence. *State v. Marshal*, 105-38.

If the explanation of possession is sufficient to raise a reasonable doubt as to whether the property was honestly obtained, the fact of such possession should not weigh against the defendant. It is error to instruct the jury that defendant's possession will be presumptive evidence of his guilt, unless he explained to the satisfaction of the jury his possession of the property, and that he came by it honestly. *State v. Miner*, 107-656.

#### SEC. 4840. Embezzlement by public officers.

[For earlier annotations, see code, pages 1917-18.—Ed.]

An officer not provided for by law is not such "public officer" as may be punished under this section for embezzlement. *State v. Spaulding*, 102-639.

One who is not a public officer may be guilty as accessory of the crime of embezzlement committed by a public officer. *State v. Rowe*, 104-323; *In re Rowe*, 77 Fed., 161.

#### SEC. 4842. Other embezzlement.

[For earlier annotations, see code, pages 1918-19.—Ed.]

By Code § 5302 it is sufficient to allege the embezzlement or fraudulent conversion to have been of money generally without designing its particular species, and it is not necessary to specify it as being gold, silver or paper. *State v. Alverson*, 105-152.

It is sufficient to charge the embezzling of a certain number of dollars named of moneys received by defendant, etc., without other allegation of the value of such money. *Ibid.*

A prosecution for embezzlement by an agent in failing to account for money received under his agency may properly be had in the city where, under his contract, it was his duty to account. His failure or

negligence or refusal to account elsewhere would not amount to conversion if, under his contract, he owed no such duty to his employer. *State v. Hengen*, 106-711.

The jurisdiction of the offense is in the county where the employe is under obligation to account to his employer. *State v. Maxwell*, 113-369.

Where a purchase of the property of the principal by the agent is ratified by the principal, with knowledge of the facts, the agent is not guilty of embezzlement in subsequently conveying the property as his own and appropriating the proceeds. *State v. Engle*, 111-246.

#### SEC. 4846. Common thief.

[For earlier annotations, see code, page 1920.—Ed.]

There is no express requirement that the previous convictions referred to in this section shall antedate the commission of the offense charged. The punishment provided is for the fourth conviction without reference to the order of time of the commission of the acts, except that the previous convictions must precede the finding of the indictment. *State v. Dale*, 110-215.

The defendant cannot be convicted under this statute on account of a petit larceny committed prior to the time that the statute went into effect, for the statute, which increases the punishment of the crimes described therein, would be *ex post facto* as to the offenses already committed. *Ibid.*

**SEC. 4850. Taking goods from officer.** If any person, knowingly and without authority of law, take, carry away, secrete or destroy any goods or chattels while the same are lawfully in the custody of any sheriff, coroner, marshal, constable, or other officer, and held by such officer by virtue of execution, writ of attachment or other legal process, he shall be guilty of

larceny, and, when the value of the property so taken, carried away, secreted or destroyed exceeds the sum of twenty dollars, be imprisoned in the penitentiary not more than one year; and when it does not exceed twenty dollars, be fined not exceeding one hundred dollars, or imprisoned in the county jail not more than thirty days. [C. '73, § 3915; R., § 4251.] [27 G. A., ch. 110, § 1.]

[For annotations, see Code, page 1921.—Ed.]

**SEC. 4852-a. Larceny—Sale of crops with landlord's lien upon.** If any tenant of farm lands shall, with intent to defraud, sell, conceal, or in any manner dispose of any of the grain, or other annual products thereof upon which there is a landlord's lien for unpaid rent, without the written consent of the landlord, he shall be guilty of larceny and punished accordingly. [29 G. A., ch. 146, § 1.]

**SEC. 4852-b. Payment of rent.** The payment of the rent for the lands upon which such grain or other annual products were raised at or before the time the same falls due, shall be a bar to any prosecution under section one (1) hereof, and no prosecution shall be commenced until such rent be wholly due [29 G. A., ch. 146, § 2.]

## CHAPTER 6.

### OF FORGERY AND COUNTERFEITING.

#### SECTION 4853. Forgery defined.

[For earlier annotations, see code, pages 1922-4.—Ed.]

If the instrument is not on the face of it such an instrument as is the subject of forgery, that fact must be shown by extrinsic allegations and evidence, and it is sufficient to set out the purport of the instrument so as to indicate that it is an instrument in writing purporting to be the act of another by which a pecuniary demand or obligation is, or purports to be, created, etc., *State v. Burling*, 102-681.

The forged instrument may be written in one county and the forgery actually committed in another county where the instrument is completed. *State v. Spayde*, 110-726.

It is forgery to falsely make or alter an instrument with intent to defraud, or to

utter it as true, intending it to be forged, although it is not stamped, as required by federal statutes, and therefore the provision of the federal statutes that an unstamped instrument is not admissible in evidence has no application to a prosecution for forgery. *State v. Shields*, 112-27.

In a prosecution for forgery, other similar forgeries may be shown to prove the intent, but other instruments claimed to have been forged cannot be introduced in evidence for this purpose, unless the fact that they are forgeries is established. *State v. Prins*, 113-72.

[The reference in 2d column of p. 1923 of Code to "*Fountain v. Smith*, 70-282" should be to "*State v. McMakin*, 70-281."]

## CHAPTER 6-A.

### OF PUNISHMENT ON CONVICTION THREE OR MORE TIMES OF CERTAIN OFFENSES, AND MAKING CERTAIN EVIDENCE COMPETENT PROOF OF FORMER CONVICTIONS.

**SECTION 4871-a. Penalty for third conviction of felony.** Whenever any person has been twice convicted of either of the crimes of burglary, robbery, forgery, counterfeiting, larceny where the value of the property stolen exceeded twenty dollars, or of breaking and entering with intent to commit a public offense any dwelling house, office, shop, store, warehouse, railroad car, boat, vessel, or building, in which goods, merchandise, or valuable things, were kept for use, sale or deposit, or has been convicted of two or more of said crimes, and shall thereafter be convicted of any one of such crimes, committed after such second conviction, he shall be imprisoned in the penitentiary for any term not less than fifteen years, provided such former judgments shall be referred to in the indictment, stating the court, date and place of rendition. [27 G. A., ch. 109, § 1.]

**SEC. 4871-b. Penalty for fourth conviction of petty larceny.** Any person over the age of eighteen years who has been three times convicted of larceny where the value of the property stolen did not exceed twenty dollars, upon being convicted the fourth time of said offense shall be imprisoned in the penitentiary not exceeding three years, provided such former judgments shall be referred to in the indictment, stating the court, date and place of rendition. [27 G. A., ch. 109, § 2.]

**SEC. 4871-c. Evidence admitted.** On the trial of any of said offenses named in this act a duly authenticated copy of the record of the former judgment in any court wherein said conviction was had, for either of said crimes against the party indicted, shall be *prima facie* evidence of such former conviction and may be used in evidence against said party. [27 G. A., ch. 109, § 3.]

**SEC. 4871-d. Duties of jury and judge.** Upon any trial when the indictment refers to former convictions of the defendant, the jury, if it finds the defendant guilty, and the court, if the defendant is convicted on a plea of guilty, must also find and determine specially whether the defendant had previously been convicted of either of the crimes referred to in the indictment and the number of times so convicted. [27 G. A., ch. 109, § 4.]

## CHAPTER 7.

### OF OFFENSES AGAINST PUBLIC JUSTICE.

#### SECTION 4872. Perjury.

[For earlier annotations, see code, pages 1927-9.—Ed.]

The corroboration of the evidence of one witness required to establish the falsity of the testimony given may be furnished by facts and circumstances as well as by direct and positive testimony. *State v. Clough*, 112-714.

The fact that the action in which the false testimony is given might be abated on account of the pendency of a former

action in another jurisdiction will not defeat the prosecution for perjury. *Ibid.*

A false affidavit for a cost bond may be material so as to constitute perjury. *Ibid.*

The certificate of the clerk to such affidavit, on proof of the handwriting of the signature thereto, is competent and sufficient *prima facie* evidence of the jurat and that he performed the duties of clerk. *Ibid.*

#### SEC. 4873. Subornation.

It is not necessary in an indictment for procuring another to commit perjury to

set out the method or means employed. *State v. Porter*, 105-677.

#### SEC. 4882. Attempt to corrupt jurors, etc.

While in an indictment to bribe a juror it must appear that the person charged had knowledge that the person whom he attempted to influence was a juror, yet it is not essential that this fact appear by direct averment. *State v. Dankwardt*, 107-704.

Where a person uses to a juror such language as "See that the right is done, it will not be to your loss," with intent to improperly influence the juror, such act may be criminal if the words are spoken with the intent to improperly influence the juror. *Ibid.*

#### SEC. 4889. Compounding felonies.

If the inseparable part of the consideration for a contract is the compounding of a felony, the whole contract is void. *Shaulis v. Buxton*, 109-355.

An agreement or understanding not to prosecute need not be the sole consideration for a contract in composition of a felony in order to render it void. It is sufficient if the contract is made upon an agreement, express or implied, to compound or

conceal the offense, or not to prosecute the same. Although the contract may have been based in part upon other valuable considerations, still, if there was such an agreement or understanding as the law forbids, combined and co-operating with that consideration, and operating as a part of the inducement for the making of the contract, then it is void and cannot be enforced. *Rosenbaum v. Levitt*, 109-292.

**SEC. 4897. Prison breach—escape.**

To constitute a breaking of prison with other prisoners outside of the prison under this section it is necessary that there be some force used, and where it appeared that the prisoner had, while being employed with other prisoners outside of the prison walls, escaped by concealing himself from the guards, held that the crime was not committed. *State v. King*, 114-413.

**SEC. 4897-a. Repeal—prison breach—penalty.** That section forty-eight hundred and ninety-seven (4897) of the code be, and the same is hereby repealed, and the following enacted in lieu thereof:

If any person confined in a penitentiary for any less period than for life, breaks such prison and escapes therefrom; or while employed on work for the state in places and buildings owned or leased by it outside of the penitentiary enclosures, or while on public roads or other ways going to or returning from such places of employment, escapes from custody, he shall be imprisoned in such penitentiary for a term not to exceed five years, to commence from and after the expiration of the original term of his imprisonment. [29 G. A., ch. 147, § 1.]

**SEC. 4897-b. To be paid from general fund.** That all costs and fees hereafter incurred in prosecutions for violations of section four thousand eight hundred ninety-seven (4897) of the code, being for breaking and escaping from the penitentiary, shall be paid out of the state treasury from the general fund, in any case where the prosecution fails, or where such fees and costs cannot be made from the person liable to pay the same, the facts being certified by the clerk of the district court and verified by the county attorney of the county. [28 G. A., ch. 128, § 1.]

**SEC. 4897-c. Amount certified to auditor of state.** The clerk of the district court, in which the case is prosecuted or tried, shall, under his seal of office, certify to the state auditor a statement of the amount of fees or costs incurred in each case, and such statement shall be approved by the presiding judge in writing appended thereto or endorsed thereon. Should the cause be appealed to the supreme court, the costs there incurred shall be certified to the state auditor by the clerk of that court, but no fees, in such case, for the clerk of either the district or supreme courts shall be included or paid from the state treasury. [28 G. A., ch. 128, § 2.]

**SEC. 4897-d. Auditor to issue warrant.** On such certificate being filed in the office of the state auditor the auditor shall issue his warrant on the state treasurer for the amount thereof, payable to the clerk of the district or supreme court, as the case may be, and the clerk shall pay the same to the persons entitled thereto. [28 G. A., ch. 128, § 3.]

**SEC. 4899. Resisting execution of process.**

[For earlier annotations, see code, page 1933.—Ed.]

The indictment for resisting an officer in serving process must allege that the defendant "knowingly" did the act complained of. It is not sufficient that the act be charged as unlawfully or wilfully done. *State v. Perry*, 109-353.

**SEC. 4905. Misdemeanors in general.**

Where by the charter of a city acting under special charter it was provided that no member of the city council should vote upon any question in which he was directly or indirectly interested, held that the action of members of the council in voting to increase their own salary was a misdemeanor under this section. *State v. Shea*, 106-735.

## CHAPTER 8.

## OF OFFENSES AGAINST THE RIGHT OF SUFFRAGE.

**SECTION 4919-a. Illegal voting—penalty.** Whenever any political party shall hold a primary election for the purpose of nominating a candidate for

any public office or for the purpose of selecting delegates to any convention of such party, it shall be unlawful for any person not a qualified elector, or any qualified elector not at the time a member in good faith of such political party, to vote at such primary election. Any person violating the provisions of this section, and any person knowingly procuring, aiding, or abetting such violation, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not to exceed one hundred dollars or be imprisoned in the county jail not to exceed thirty days. [27 G. A., ch. 111, § 1.]

**SEC. 4919-b. Prima facie evidence.** It shall be *prima facie* evidence of the violation of the preceding section, for any person who has participated in any primary election of one political party, to vote at a primary election held by another political party, to select candidates to be voted for at the same election; or to select delegates to any convention of the party holding such primary election. [27 G. A., ch. 111, § 2.]

**SEC. 4919-c. Authority to administer oaths.** Any judge of such primary election shall have power to administer oaths to, and to examine under oath, any person offering to vote at such election, touching his qualifications to participate in such primary election, and it shall be the duty of such judge of election to so examine or cause to be examined any person challenged as to his right to vote. Any person testifying falsely as to any material matter, touching his qualifications to participate in such primary election, shall be deemed guilty of perjury and punished accordingly. [27 G. A., ch. 111, § 3.]

**SEC. 4919-d. What excepted.** Nothing in this act shall be construed to apply to conventions held under the caucus system. [27 G. A., ch. 111, § 4.]

**SEC. 4928. Illegally receiving or rejecting votes.**

An election officer will not be criminally liable for refusing to receive the ballot of an elector unless the elector, being qualified by compliance with the law to vote, tenders his ballot within the time within which it is the duty of the election officer

to receive ballots. *State v. Clark*, 102-685.

The refusing of a ballot by the election officer may be wilful if it is purposely and deliberately done, without regard to whether the officer had just grounds for believing the ballot to be lawful. *Ibid.*

## CHAPTER 9.

### OF OFFENSES AGAINST CHASTITY, MORALITY AND DECENCY.

#### SECTION 4932. Adultery.

[For earlier annotations, see code, pages 1938-9.—Ed.]

A married man can be prosecuted for adultery only at the instance of his wife and not at the instance of the husband of the woman with whom the adultery was committed. *Sloan v. Davis*, 105-97.

The crime of adultery is an offense against the innocent spouse of the person guilty of it and against the state, for which a divorce and subsequent marriage of the guilty parties do not atone, nor constitute a bar to prosecution. The statute does not necessarily limit the prosecution to cases in which complaint is made by the person who is the husband or wife of the guilty spouse at the time the complaint is made, but the phrase "husband or wife" refers to the relation existing at the time the offense is committed. *State v. Smith*, 108-440.

The state is not required to confine its evidence to the commission of the crime charged on the dates specified in the indictment, but may show that it was committed at any time within eighteen months preceding the finding of the indictment. If defendant is entitled to have the state elect as to which one of several alleged acts is relied on, he must ask that the state be required to make such election before the case is submitted to the jury. *Ibid.*

Correspondence between the parties, showing their disposition toward each other is admissible in a prosecution for adultery. *State v. Butts*, 107-653.

While direct proof of the act of intercourse is not required in a prosecution for adultery, it is necessary that the circum-

stances shown be inconsistent with innocent conduct. *State v. Chaney*, 110-199.

For the purpose of showing adulterous disposition subsequent acts of sexual intercourse between parties may be shown. *State v. More*, 88 N. W., 322.

In a particular case, held, that the evi-

dence was not sufficient to sustain a conviction for the offense. *State v. Wiltsey*, 103-54.

Evidence in a particular case held sufficient to sustain a conviction. *State v. Schaedler*, 90 N. W., 91.

#### SEC. 4936. Incest.

[For earlier annotations, see code, pages 1940-1.—Ed.]

A conviction may be had of the crime of incest although the facts show that the act would also constitute rape. *State v. Kouhns*, 103-720.

The provision (Code § 5488) requiring corroboration of the evidence of prosecutrix in a prosecution for rape or seduction does not in terms refer to incest and is not applicable thereto. *Ibid.*

The female is not an accomplice in such sense as that corroboration of her testimony is necessary under Code § 5489. *Ibid.*

An indictment for incest which charges carnal knowledge on the part of the accused only, is sufficient without also charging such carnal knowledge on the part of the other party to the connection. *State v. Kimble*, 104-19.

**SEC. 4937-a. Sodomy.** Whoever shall have carnal copulation in any opening of the body except sexual parts, with another human being, or shall have carnal copulation with a beast, shall be deemed guilty of sodomy. [29 G. A., ch. 148, § 1.]

#### SEC. 4938. Lewdness—indecent exposure.

[For earlier annotations, see code, page 1941.—Ed.]

It is not necessary that the indictment should name the person to whom the defendant exposed his person. A defendant might properly be convicted of this offense although no person witnessed the indecent act, as for instance where a case might be made out on a confession corroborated by circumstances. *State v. Bauguess*, 106-107.

The phrase "an indecent exposure of the person," has a well-settled and commonly-

accepted signification, and means the exposure of such parts of the person as modesty or a sense of self-respect requires to be kept usually covered, and it is not necessary in an indictment for the offense to more particularly describe the part of the body exposed. The language of the Code not only names but describes the offense and it is sufficient to charge it in the language of the statute. *Ibid.*

#### SEC. 4939. Keeping house of ill fame.

[For earlier annotations, see code, pages 1941-2.—Ed.]

A covered wagon used for purposes of prostitution which is moved about from place to place is a house of ill fame, within the meaning of this section. (Following

*State v. Mullin*, 35-207, holding that a boat on the Mississippi river was a house of ill fame.) *State v. Chauvet*, 112-687.

#### SEC. 4944. Evidence.

[For earlier annotations, see code, page 1943.—Ed.]

Evidence as to reputation for want of chastity of the keeper of a house of ill fame

prior to the findings of the indictment is admissible. *State v. Beebe*, 88 N. W., 358.

**SEC. 4946-a. Repeal.** That section forty-nine hundred and forty-six (4946) of the code be and the same is hereby repealed, and the following enacted as a substitute therefor. [28 G. A., ch. 129, § 1.]

**SEC. 4946-b. Bodies for medical purposes—how distributed.** Every coroner, undertaker, superintendent or managing officer of any public asylum, hospital, poor house, or penitentiary in this state, shall deliver the bodies of uninterred deceased persons in his charge suitable for scientific purposes with the consent of the friends or relatives, if known, and without such consent if not known, to medical colleges or schools within the state, for the purpose of scientific medical study, unless the deceased person expressed a desire during his last illness that his body should be buried or cremated; such bodies shall be equitably distributed among the medical colleges and schools in the state under such rules and regulations as may be

adopted by the state board of health, and the number so distributed shall be in proportion to the number of students matriculated at each medical college or school. The expense of such distribution shall be paid by the medical college or school receiving the bodies. If there shall be more bodies than are required by the medical colleges or schools of the state, the same may be delivered to physicians in the state, under such rules and regulations as may be adopted by the state board of health. [28 G. A., ch. 129, § 2.]

**SEC. 4946-c. Duties of various officers.** It shall be the duty of every such coroner, undertaker, superintendent or managing officer of a public asylum, hospital, poor house or penitentiary, as soon as any such body shall come into his custody, or as soon as any person shall die, whose body, under the provisions hereof, should be delivered to a medical college or school, to at once notify the secretary of the state board of health by telegram of the fact, and to hold such body unburied for forty-eight hours thereafter, and to deliver the body to such medical college or school as the secretary of the state board of health may direct. If, however, such body is subsequently claimed by any relative or friend, it shall be at once, by the person or persons having the same in charge, or by the medical college or school to which it has been delivered, surrendered to such relative or friend for burial. [28 G. A., ch. 129, § 3.]

**SEC. 4946-d. Body held subject to claim.** Every medical college or school, or person receiving the body of any deceased person under the provisions hereof, shall hold the same for the period of sixty days, subject to the claim of relatives or friends. [28 G. A., ch. 129, § 4.]

**SEC. 4946-e. Penalties.** Any coroner, undertaker, superintendent or managing officer of any public asylum, hospital, poor house or penitentiary within this state into whose hands the body of a deceased person shall come, which should be delivered to a medical college or school under the provisions hereof, who shall wilfully neglect or refuse to notify the secretary of the state board of health of the existence of such body, or refuse to deliver the same to a medical college or school upon the direction of the secretary of the state board of health, as herein provided, shall be guilty of a misdemeanor, and upon conviction thereof be fined any sum not exceeding fifty dollars; and any person who shall receive or deliver any body or remains knowing that any of the provisions of this act have been violated, shall be imprisoned in the penitentiary not more than two years, or fined not exceeding twenty-five hundred dollars, or both. [28 G. A., ch. 129, § 5.]

#### **SEC. 4965. Gaming contracts void.**

[For earlier annotations, see code, pages 1947-8.—Ed.]

Where the question was whether, in purchases of grain made on the board of trade by plaintiff as the agent of defendant, it was intended that no delivery of the grain should be made, held, that evidence of the defendant's intention was admissible although such intention would not be controlling *Counselman v. Reichart*, 103-430.

In such case, held, that in view of the generally known fact that business on the

board of trade is conducted on a plan of non-delivery of produce but as a speculation in margins or differences, the intention of the parties might be determined by evidence outside of the correspondence by telegraph under which the purchases were made. *Ibid.*

A note given in settlement of a balance growing out of dealings in options is void. *People's Sav. Bank v. Gifford*, 108-277.

#### **SEC. 4967. Dealing in options—bucket shops.**

Aside from statutory provisions, an executory contract for the sale of property is void where delivery of the property is neither made nor contemplated, and where

settlement is to be made by payment of the difference between the contract price and the market price of the property at the time fixed for settlement. *Ibid.*

#### **SEC. 4969. Cruelty to animals.**

One who does an act in violation of this section is guilty of a wrong and is liable for

injuries resulting to any one therefrom, so far as such injuries are the natural and

proximate consequence of such act, and even though the precise result which followed may not have been anticipated. *Osborne v. Van Dyke*, 113-557.

## CHAPTER 10.

### OF OFFENSES AGAINST PUBLIC HEALTH.

**SECTION 4984-a. Manufacture—sale.** That no person shall by himself, his servant or agent, or as the servant or agent of any other person or corporation, manufacture for sale, or knowingly sell or offer to sell any candy adulterated by the admixture of terra alba, barytes, talc, or any other mineral substance, by poisonous colors or flavors, or other ingredients, deleterious or detrimental to health. [27 G. A., ch. 112, § 1.]

**SEC. 4984-b. Penalty.** Whoever violates any of the provisions of this act shall be punished by a fine not exceeding one hundred dollars (\$100.00) nor less than fifty dollars (\$50.00). The candy so adulterated shall be forfeited and destroyed under the direction of the court. [27 G. A., ch. 112, § 2.]

**SEC. 4989. Sale of impure or skimmed milk—skimmed-milk cheese—labeling.**

It is an offense under this section to add water and boracic acid to milk, although without intent to defraud. *State v. Schlenker*, 112-642.

**SEC. 4990. What deemed adulterated or impure milk.**

This section is not unconstitutional as applied to the sale of milk adulterated by the addition of water and boracic acid, even though such adulteration is known to the purchaser. *State v. Schlenker*, 112-642.

**SEC. 4999-a. Water closets or privies.** Every manufacturing establishment, work shop or hotel in which five or more persons are employed, shall be provided with a sufficient number of water closets, earth closets or privies for the reasonable use of the persons employed therein, which shall be properly screened and ventilated and kept at all times in a clean condition; and if women or girls are employed in such establishment, the water closets, earth closets or privies used by them shall have separate approaches and be separate and apart from those used by the men. [29 G. A., ch. 149, § 1.]

**SEC. 4999-b. Duties of parties in charge.** It shall be the duty of the owner, agent, superintendent or other person having charge of any manufacturing or other establishment where machinery is used, to furnish and supply or cause to be furnished and supplied therein, belt shifters or other safe mechanical contrivances for the purpose of throwing belts on and off pulleys, and, wherever possible, machinery therein shall be provided with loose pulleys; all saws, planers, cogs, gearing, belting, shafting, set-screws and machinery of every description therein shall be properly guarded. No person under sixteen years of age, and no female under eighteen years of age shall be permitted or directed to clean machinery while in motion. Children under sixteen years of age shall not be permitted to operate or assist in operating dangerous machinery of any kind. [29 G. A., ch. 149, § 2.]

**SEC. 4999-c. Blowers and pipes.** All persons, companies or corporations operating any factory or work shop where emery wheels or emery belts of any description, or tumbling barrels used for rumbling or polishing castings, are used, shall provide the same with blowers and pipes of sufficient capacity, placed in such manner as to protect the person or persons using same from the particles of dust produced or caused thereby, and to carry away said particles or dust arising from or thrown off such wheels, belts or

tumbling barrels while in operation, directly to the outside of the building, or to some receptacle place[d] so as to receive or confine such particles or dust; provided, however, that grinding machines upon which water is used at the point of grinding contact, and small emery wheels which are used temporarily for tool grinding, are not included within the provisions of this section, and the shops employing not more than one man at such work may, in the discretion of the commissioner of the bureau of labor of the state, be exempt from the provisions hereof. [29 G. A., ch. 149, § 3.]

**SEC. 4999-d. Enforcement—penalty.** It shall be the duty of the commissioner of the bureau of labor of the state, and the mayor, and chief of police of every city or town, to enforce the provisions of the foregoing sections. Any person, whether acting for himself or for another or for a copartnership, joint stock company or corporation, having charge or management of any manufacturing establishment, work shop or hotel, who shall fail to comply with the provisions of said sections, within ninety days after being notified in writing to do so, by any one of said officers whose duty it may be to enforce the provisions of said sections, shall be punished by a fine not exceeding one hundred dollars or by imprisonment in the county jail not exceeding thirty days. [29 G. A., ch. 149, § 4.]

**SEC. 4999-e. Protection against fire—means of escape.** The owners, proprietors or lessees of all buildings, structures or enclosures of three or more stories in height, now constructed or hereafter to be erected, shall provide for and equip said buildings and structures with such protection against fire and means of escape from such buildings as shall hereafter be set forth in this bill. [29 G. A., ch. 150, § 1.]

**SEC. 4999-f. Buildings and enclosures—how classified.** The buildings, structures and enclosures contemplated in this act shall be classified as follows:

*First.* Hotels or lodging rooms of three or more stories in height.

*Second.* Tenements or boarding houses, of three or more stories in height, occupied by one or more families or aggregating twenty (20) persons or more; provided that a mansard roof or attic, when used for sleeping rooms, shall be counted as one story.

*Third.* Buildings used as opera houses, theatres or public halls, of a seating capacity exceeding three hundred (300).

*Fourth.* Public school buildings, seminaries, and colleges more than two stories in height.

*Fifth.* Hospitals and asylums of three or more stories in height.

*Sixth.* Manufactories, ware houses and buildings of all character of three or more stories in height, not specified in the foregoing sections. [29 G. A., ch. 150, § 2.]

**SEC. 4999-g. Fire escapes and stairways.** Each twenty-five hundred (2,500) superficial feet of area, or fractional part thereof, covered by buildings or structures specified under classification one, of section 2, of this act, shall be provided with one ladder fire escape of steel or wrought iron construction, attached to the outer wall thereof, and provided with platforms of steel or wrought iron construction of such size and dimensions and such proximity to one or more windows of each story above the first as to render access to such ladder from each story easy and safe, said ladder to start about five feet from the ground and extend above the roof, or a drop ladder may be hung at the second story in such a manner that it can be easily lowered in case of necessity, provided, however, that where such buildings shall be occupied by more than twenty (20) persons, the said building shall be provided with one stairway of steel or wrought iron construction with above described platforms, accessible from each story with a drop or counterbalance stairway from the second story balcony to the ground, or a stationary stairway may be carried down to within five feet from the ground.

Buildings under classification 2 of section 2 of this act shall be provided for in the same manner as those under the head of classification 1.

Buildings under classification 3, of section 2, of this act shall be provided with at least one of above described outside stairways, or such a number [of] exits or such a number of above described stairways as may be determined by the chief of fire department, or the mayor of each city or town where no such chief of fire department exists.

Each twenty-five hundred (2,500) superficial feet of area or fractional part thereof covered by buildings, structures or enclosures under classification 4 of section 2 of this act, shall be provided for in the same manner as those under the head of classification 3.

Each twenty-five hundred (2,500) superficial feet of area or fractional part thereof covered by buildings, structures or enclosures under classification 5, section 2, of this act shall be provided with at least one above described outside stairway, provided, however, that if there be living or sleeping quarters for more than twenty-five (25) persons in such building, then there shall be at least two of the above described outside stairways.

Each five thousand (5,000) superficial feet of area or fractional part thereof covered by buildings under classification 6, section 2 of this act, shall be provided with at least one above described ladder, and platforms at each story, if not more than twenty (20) persons be employed in the same. If more than twenty (20) persons be employed, then there shall be at least two of the above described ladders, and platforms attached, or one such stairway, and platforms of sufficient size at each story, and if more than forty (40) persons be employed in said building, then there shall be at least two, or such number of the above described outside stairways as the chief of fire department, or the mayor of any city or town where no such chief of fire department exists, may from time to time determine. [29 G. A., ch. 150, § 3.]

**SEC. 4999-h. Enforcement—penalty.** It is hereby made the duty of the chief of fire department, or the mayor of each city or town where no such chief of fire department exists, or the chairman of the board of supervisors, in case such building is not within the corporate limits of any city or town, to adopt uniform specifications for fire escapes hereinbefore provided, and keep such specifications on file in their respective offices, and to serve or cause to be served a written notice in behalf of the state of Iowa upon the owner or owners, or their agents or lessees, of buildings within this state not provided with fire escapes in accordance with the provisions of this act, commanding such owner, owners, or agents or either of them, to place or cause to be placed upon said buildings, such fire escape or fire escapes as are provided within this act within sixty days after service of such notice, pursuant to the specifications established. Any such owner, owners or agents, trustees or either of them so served with notice as aforesaid, who shall not within sixty days after the service of said notice upon him or them, place or cause to be placed such fire escape or fire escapes upon such buildings as required by this act and the terms of said notice, shall be subject to a fine not less than fifty (\$50) dollars, and not more than one hundred (\$100) dollars, and shall be subject to a further fine of twenty-five (\$25) dollars for each additional week of neglect to comply with such notice. [29 G. A., ch. 150, § 4.]

**SEC. 4999-i. Inspection.** All fire escapes erected under the provisions of this act shall be subject to inspection and approval or rejection in writing, by the person named in section 4 of this act who has caused such written notice to be served. [29 G. A., ch. 150, § 5.]

**SEC. 4999-j. In effect—repeal—acts in conflict.** This act shall take effect and be in force from and after the fourth day of July, A. D. 1902. All acts or parts of acts inconsistent with this act are hereby repealed. [29 G. A., ch. 150, § 6.]

**SEC. 4999-k. Use of dangerous fluids forbidden.** That it shall be unlawful for any person to establish or operate any dye works, pantorium,

or cleaning works, in which gasoline, benzine, naphtha, or other explosive or dangerous fluids are used for the purpose of cleaning or renovating wearing apparel or other fabrics, in any building any part of which is used as a residence or lodging-house. [28 G. A., ch. 130, § 1.]

**SEC. 4999-1. Penalty.** Any person convicted of violating the provisions of the foregoing section shall be fined in a sum not exceeding fifty (50) nor less than ten (10) dollars. [28 G. A., ch. 130, § 2.]

## CHAPTER 11.

### OF OFFENSES AGAINST PUBLIC POLICY.

#### SECTION 5000. Lotteries and lottery tickets.

[For earlier annotations, see code, page 1954.—Ed.]

A contract in furtherance of a lottery scheme is invalid. *Chancy Park Land Co. v. Hart*, 104-592.

But where purchasers of lots, buying under a contract by which the lots purchased were to be distributed among them

as they might agree, entered into an arrangement by which such lots were distributed by chance, held, that the transaction was not a lottery and that the sale was valid. *Ibid.*

#### SEC. 5002. Allowing minors in billiard rooms, saloons, etc.

[For earlier annotations, see code, page 1954.—Ed.]

It is immaterial whether the minor indulges in any game whatever if he is permitted to enter and remain in the billiard

hall. The term "billiard hall" includes a hall in which pool is played. *State v. Johnson*, 108-245.

#### SEC. 5006. Sale of cigarettes.

[For earlier annotations, see code, page 1955.—Ed.]

The statute prohibiting the manufacture or sale of cigarettes within the state is void in so far as it applies to the sale of cigarettes imported into the state and sold in the original packages. *McGregor v. Cone*, 104-465.

The original package is the bundle put

up for transportation or commercial handling, and where such a package was broken open and its contents, consisting of small packages containing ten each, were exposed and sold, held, that the seller was punishable. *Ibid.*

**SEC. 5016-a. Repeal—not to be dealt in.** That section five thousand and sixteen (5016) of the code is hereby repealed and the following enacted as a substitute therefor:

No person shall buy, sell, deal in or give away, or offer to buy, sell or deal in any swine that have died of any disease, or that have been killed on account of any disease. [27 G. A., ch. 113, § 1.]

**SEC. 5028-a. Misdemeanor.** If any person shall publicly mutilate, insult, trample upon, or defile, by act, any flag, standard, color, or ensign of the United States, he shall be deemed guilty of a misdemeanor. [28 G. A., ch. 131, § 1.]

## CHAPTER 12.

### OF OFFENSES AGAINST THE PUBLIC PEACE.

**SECTION 5034. Using blasphemous or obscene language.** If any person publicly use blasphemous or obscene language, to the disturbance of the public peace and quiet, he shall be imprisoned in the county jail not exceeding thirty days, or be fined not exceeding one hundred dollars. [28 G. A., ch. 132, § 1.]

**SEC. 5038-a. Boxing contest—sparring exhibition—penalty.** Whoever engages in any boxing contest or sparring exhibition with or without

gloves for a prize, reward, or anything of value, at which an admission fee is charged or received, either directly or indirectly, and whoever knowingly aids, abets, or assists in any such boxing contest or sparring exhibition, and any owner or lessee of any ground, lot, building, hall, or structure of any kind knowingly permitting the same to be used for such boxing contest or sparring exhibition, shall be fined not exceeding three hundred dollars, or imprisonment in the county jail not exceeding ninety days. [28 G. A., ch. 133, § 1.]

#### SEC. 5040. Breach of Sabbath.

[For earlier annotations, see code, page 1961.—Ed.]

A subscription for payment of an indebtedness of a church is a matter of charity, and the fact that it is made on Sunday will not constitute a defense. *First M. E. Church v. Donnell*, 110-5.

The fact that an accident causing injury to a miner occurs in connection with work on Sunday is immaterial as to the right of the miner to recover for negligence of the mine owner. *Taylor v. Star Coal Co.*, 110-40.

The doing of an act which is a violation of the Sunday law will not constitute a violation of law under the terms of an accident insurance policy, where the risk is the same on Sunday as it would have been on a secular day. *Matthes v. Imperial Acc. Assn.*, 110-222.

A ministerial act done on Sunday, such as giving notice, will not be invalid, unless specially prohibited. *State v. Ryan*, 113-536.

### CHAPTER 13.

#### OF CHEATING BY FALSE PRETENSES, GROSS FRAUDS, AND CONSPIRACY.

#### SECTION 5041. False pretenses.

[For earlier annotations, see code, pages 1962-3.—Ed.]

To secure by false pretenses the signature to a deed in which the name of the grantee is left blank may constitute a crime under this section. *State v. Tripp*, 113-698.

Allegations of an indictment in a particular case, held to sufficiently negative the truth of the pretenses alleged and to sufficiently charge that defendant made the representations, knowing them to be false. *Ibid.*

In charging the offense of obtaining a signature to a promissory note by means of false and fraudulent representations, it is not necessary to charge that the representations were made with the specific intent to defraud the person from whom the note was obtained. It is sufficient that the form of the indictment in that respect follows the statute. *State v. Hazen*, 104-16.

The indictment may allege several false pretenses and proof of one of them is sufficient to warrant conviction. *State v. Chingren*, 105-169.

An indictment charging that defendant obtained the signature of a person named to a written instrument commonly called a bank check, the false making of which would be punished as forgery, "for the sum of thirty-five dollars," and that the person named did then and there draw and sign said bank check and deliver the same, etc., is sufficient. *State v. Carter*, 112-15.

The indictment sufficiently charges that the person defrauded relied on the false representations in alleging that he would not have signed the check nor delivered it to the defendant had it not been for the representations so falsely and fraudulently made. *Ibid.*

It is immaterial that some of the statements and representations alleged are in the alternative. *Ibid.*

Evidence of similar pretenses made about the same time and in the same neighborhood to other persons may be shown, but unless there is evidence that such other pretenses were false the evidence with reference thereto should be stricken out on motion. *Ibid.*

To make out the offense it must be shown that the pretense was of a past event or existing fact, that it was false, calculated to deceive, and was believed and relied on by the party defrauded. But it is not necessary that the false pretenses be the sole inducement to the act procured to be done. *Ibid.*

Obtaining money as a charitable gift by false pretenses is an offense under this section. *Ibid.*

It does not render the indictment insufficient that different and even inconsistent means of perpetrating the fraud are alleged to have been used. A false promise in addi-

tion to the false representation may be stated. *State v. Tripp*, 113-698.

It is not essential that all the false pre-

tenses charged in the indictment be proved in order to warrant a conviction. *State v. Dexter*, 87 N. W., 417.

#### SEC. 5044. False weights and measures.

[For earlier annotations, see code, page 1964.—Ed.]

The offense described in this section is not a continuing one. Each act of false weighing is a distinct offense, unless it is but one of a series of acts forming a part of a single transaction. The defendant therefore in a prosecution under this section has the right to require an election on the part of the state, where the evidence tends to show different transactions. *State v. Jamison*, 110-337.

An indictment under this section is not sufficient which charges defendant with unlawfully and fraudulently keeping false weights, and with knowingly buying cattle weighed therewith. The indictment must

charge that the defendant used the weights. *Ibid.*

In a prosecution for using false weights, evidence that the defendant's scales were inaccurate at other times than on the occasion referred to in the indictment is admissible as tending somewhat to show guilty knowledge. *Ibid.*

The offense described in this section is not a continuing one, and where the indictment charged the weighing of divers cattle and hogs purchased from divers citizens, etc., held, that the indictment was bad for duplicity. *State v. Jameson*, 90 N. W., 622.

**SEC. 5052. Unlawful use or sale of bottles, boxes, etc., of another.** Persons engaged in the manufacture, bottling or selling of soda water, mineral or aerated waters, cider, milk, cream or other lawful beverages in bottles, boxes, casks, kegs or barrels, with their names or other marks of ownership stamped or marked thereon, may file in the office of the recorder of the county in which such articles are manufactured, bottled or sold a description of the name or marks so used by them, and cause notice thereof to be given by three consecutive publications in a weekly newspaper printed in the English language in said county. It shall thereupon be unlawful for any person, without the written consent of the owner, to fill such bottles, boxes, casks, kegs or barrels so marked or stamped, for the purpose of sale, or to sell, dispose of, buy or traffic in or wantonly destroy the same, whether filled or not, and any violation of this section shall be a misdemeanor, and any person convicted thereof shall be fined not exceeding one hundred dollars, or imprisoned in the county jail not exceeding thirty days. The using by any other person than the rightful owner, without written permission, of any such cask, barrel, keg, bottle or box, as prohibited in this section, or the possession thereof by any junk dealer, or dealer in such casks, barrels, kegs, bottles or boxes, the same being marked or stamped and registered as herein required, shall be *prima facie* evidence that such use, and the sale or possession, is unlawful, and search warrants may be procured for the discovery and seizure of such bottles, boxes, casks, kegs or barrels, as in other criminal cases. [25 G. A., ch. 79.] [29 G. A., ch. 151, § 1.]

#### SEC. 5058. Conspiracy to prosecute.

In a prosecution for conspiracy, held that evidence of acts of co-conspirators in the county where the prosecution was had, and also in other counties where it appeared that the same fraudulent scheme was

attempted, was admissible. *State v. McIntosh*, 109-209.

Also, held, that evidence of declarations by one conspirator, in the presence of the others, though made after the alleged conspiracy was ended, was competent. *Ibid.*

#### SEC. 5059. Conspiracy in general.

[For earlier annotations, see code, pages 1967-8.—Ed.]

Conspiracy is a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal, by criminal or unlawful means. The mere knowledge, acquiescence or approval of an act without co-operation or agreement to co-op-

erate is not enough to constitute the crime of conspiracy to do such act. The combination must contemplate the accomplishment of the purpose by the united energy of the persons accused of such conspiracy, or active participation must be shown. *State v. King*, 104-727.

## CHAPTER 14.

## OF NUISANCES, AND ABATEMENT THEREOF.

**SECTION 5078. What deemed nuisances.**

[For earlier annotations, see code, pages 1971-2.—Ed.]

In a civil action held error to tell the jury that any of the matters enumerated in this section, specifying them, would constitute a nuisance, there being no evidence

as to the existence of some of the matters so specified. *Hollenbeck v. Marion*, 89 N. W., 210.

**SEC. 5081. Penalty—abatement.**

[For earlier annotations, see code, page 1973.—Ed.]

Where a justice of the peace had authority by statute to impose a penalty for maintaining a dam without a fishway, and in a proceeding to impose such penalty it was decided that there was no obligation to maintain a fishway, and this decision was

not appealed from, held that it constituted an adjudication which would bar a subsequent proceeding against the owner to compel the construction of such fishway. *State v. Meek*, 112-338.

## CHAPTER 15.

## OF LIBEL.

**SECTION 5086. Definition.**

[For earlier annotations, see code, page 1974.—Ed.]

It is not necessary that the publication charge the commission of a crime. Charges that defendant, who was a county superintendent, violated the rules of common decency in connection with the duties of his office, was irreligious, dishonest and contributed disgraceful matter for publication, held to be libelous. *State v. Keenan*, 111-286.

Libelous matter published in regard to a candidate for a public office is not privileged unless the publication is for the sole purpose of advising the electors of his character with reference to his qualifications for such office. *Ibid.*

The questions of justification and privilege are for the jury. *Ibid.*

Where the libelous matter charges dishonesty in regard to payment of debts, the prosecuting witness may testify as to his family, means and occupation as bearing on his ability to pay his debts, and tending to rebut the claim of dishonesty in not doing so. *Ibid.*

Where the libelous matter charges lewdness, held that the prosecuting witness

might introduce testimony to show that there was no general talk in the community as to his being a person of lewd character. *Ibid.*

Subsequent publications of a libel are admissible for the purpose of showing motive for the first publication. *State v. Heacock*, 106-191.

Evidence is not admissible in behalf of defendant in a prosecution for libel to show the reputation of the defendant for truth and veracity. *Ibid.*

This statutory provision as to publication of a libel concerning a deceased person does not make the publisher of a libel concerning an adult deceased civilly liable to the mother of the deceased for shame, humiliation and mental anguish suffered by her on account thereof. *Bradt v. New Nonpareil Co.*, 108-449.

In a civil action it is not proper to state to the jury all these different forms under which a libel may be committed, without regard to evidence supporting each of them. *Wallace v. Homestead Co.*, 90 N. W., 835.

**SEC. 5088. Truth given in evidence.**

[For earlier annotations, see code, page 1975.—Ed.]

Evidence of good faith is admissible, not as a defense in itself, but only as an element going to make up the defense of qualified privilege, and where a newspaper publisher made libelous statements with reference to a candidate for the office of district judge, and through his newspaper published such statements outside of the judicial district within which the person

referred to was a candidate, held, that he had exceeded his privilege, and that it constituted no defense. *State v. Haskins*, 109-656.

Where publication of libelous matter is shielded by no privilege, the defendant cannot exonerate himself by showing a belief on his part in the truth of the charge. *Ibid.*

**SEC. 5091. Jury determine law and fact.**

[For earlier annotations, see code, page 1975.—Ed.]

The "direction of the court" referred to in this section is the instruction or charge of the court to the jury. The jury is not required to determine all legal questions which may arise on the trial as to the sufficiency of the evidence, etc., but only such matters as it may consider in deliberating upon a verdict. The jury has not merely the power but also the right to determine the law which should govern the verdict, even though a decision in conflict

with the charge of the court may be reached. The opinion of the court must be regarded as advisory and not conclusive as to the duty of the jury. *State v. Heacock*, 106-191.

It is not error to instruct that if the jury can say on their oaths that they know the law better than the court does they have the right to determine the law as contrary to the instructions of the court. *Ibid.*

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**CHAPTER 15-A.**
**OF HABITUAL CRIMINALS.**

**SECTION 5091-a. Habitual criminal—punishment.** Whoever has been twice convicted of crime, sentenced and committed to prison, in this or any other state, or by the United States, or once in this state and once at least in any other state, or by the United States, for terms of not less than three years each, shall, upon conviction of a felony committed in this state after the taking effect of this act, be deemed to be an habitual criminal, and shall be punished by imprisonment in the penitentiary for a term of not less than twenty-five years, provided that no greater punishment is otherwise provided by statute, in which case the law creating the greater punishment shall govern, and further provided, that if the person so convicted shall show, to the satisfaction of the court before whom such conviction was had, that he was released from imprisonment, upon either of said sentences, upon a pardon granted for the reason that he was innocent, such conviction and sentence shall not be considered as such under this act. [29 G. A., ch. 152, § 1.]

**SEC. 5091-b. Competent and prima facie evidence.** On the trial of any cause, under the provisions of this act, a duly authenticated copy of the former judgment and commitment, from any court in which such judgment and commitment was had, for either of the said crimes formerly committed by the party indicted under this act, shall be competent and *prima facie* evidence of such former judgment and commitment, and may be used in evidence upon the trial of said cause. [29 G. A., ch. 152, § 2.]

## TITLE XXV.

### OF CRIMINAL PROCEDURE.

#### CHAPTER 1.

##### OF PUBLIC OFFENSES.

**SECTION 5096. All offenses bailable except.** All defendants are bailable both before and after conviction, by sufficient surety, except for offenses punishable with death under the laws of the state when the proof is evident or the presumption great. No defendant convicted of murder in the first degree, or of the crime of treason shall be admitted to bail. [17 G. A., ch. 103, § 1; C. '73, §§ 3845, 4107; R., § 4188; C. '51, § 2565.] [29 G. A., ch. 153, § .]

[For earlier annotations, see code, page 1976.—Ed.]

[The paragraphs in 2d column of notes Code § 5296. The last sentence of the Code to this section in the Code under the heading "Knowledge of falsity," being under section is in conflict with § 5442.]

#### CHAPTER 2.

##### OF MAGISTRATES AND PEACE OFFICERS AND THEIR POWERS.

##### SECTION 5099. Peace officers.

[For earlier annotations, see code, page 1977.—Ed.]

A deputy city marshal is not a peace officer. *Twinam v. Lucas County*, 104-231.

#### CHAPTER 5.

##### OF VAGRANTS.

##### SECTION 5130. Imprisonment.

All vagrants are not tramps, within the definition of Code § 5137 with reference to limitation of fees of officers in tramp cases. *Des Moines v. Polk County*, 107-525.

#### CHAPTER 7.

##### OF LOCAL JURISDICTION OF PUBLIC OFFENSES.

##### SECTION 5154. District court.

[For earlier annotations, see code, pages 1983-4.—Ed.]

In every criminal case jurisdiction must be shown, and where there is a dispute in the evidence as to the venue the jury must determine that dispute, the same as it does any other issue of fact. *State v. Spayde*, 110-726.

##### SEC. 5157. Offense partly in county.

[For earlier annotations, see code, page 1984 —Ed ]

In prosecutions for embezzlement, the venue can always be laid in the county where the conversion actually took place. If the charge is against an agent who has

failed to account, the prosecution may be in the county where it was his duty to account under his contract. *State v. Hengen*, 106-711.

In a prosecution for embezzlement the venue is in the county where the employe was under obligation to account to his employer. *State v. Maxwell*, 113-369.

When a public offense is committed partly in one county and partly in another, the court first taking jurisdiction holds it to the end, and it is erroneous for the first court to dismiss the prosecution and hold the prisoner to await a warrant from the other county. *State v. Spayde*, 110-726.

### SEC. 5158. Near boundary of two counties.

[For earlier annotations, see code, pages 1984-5.—Ed.]

As to a crime committed in one county but within five hundred yards of the boundary line of an adjoining county, the court which first obtains jurisdiction of the person accused should retain it to the exclusion of the court of the other county. Therefore where a party was arrested upon a warrant issued by a justice of the peace of Iowa county upon the charge of having committed a public offense in Keokuk county but within five hundred yards of the line between such counties, and he was bound over to await the action of the grand jury of Iowa county, held, that he could not subsequently be indicted by the grand

jury of Keokuk county for the same offense and might by *habeas corpus* be released from imprisonment under such indictment. *Carter v. Barlow*, 105-78.

Under an indictment charging an offense to have been committed in the county, evidence is admissible of its commission within five hundred yards of the boundary line in an adjoining county, but an indictment averring the commission of the offense in Iowa county or in Keokuk county, within five hundred yards of the south line of Iowa county, "as nearly as the grand jury know and can state," is fatally defective. *State v. Daily*, 113-362.

## CHAPTER 8.

### OF THE TIME OF COMMENCING CRIMINAL ACTIONS.

#### SECTION 5164. What within eighteen months.

[For earlier annotations, see code, page 1986.—Ed.]

In a prosecution for adultery the state may prove the offense if committed at any time within eighteen months before the

finding of the indictment, and is not limited to the time specified in the indictment. *State v. Smith*, 108-440.

## CHAPTER 9.

### OF FUGITIVES FROM JUSTICE.

#### SECTION 5172. Requisition from another state.

One who is charged by preliminary information with a crime which is extraditable under a treaty with a foreign country may properly be brought back for trial

under such charge and tried under an indictment which, though in different terms, charges the same offense as that charged in the information. *State v. Rowe*, 104-323.

## CHAPTER 12.

### OF PRELIMINARY EXAMINATIONS.

#### SECTION 5227. Minutes of examination.

[For earlier annotations, see code, pages 1986-7 —Ed.]

The minutes of the evidence of a witness on preliminary examination are not admissible on the trial of the case, either as original evidence or for the purpose of impeaching the testimony of the same witness

given on the trial. *State v. Reinheimer*, 109-624.

The examination may be taken and certified by one who is not an official reporter. *State v. Turner*, 114-426.

**SEC. 5228. Certificate.**

[For earlier annotations, see code, page 1997.—Ed.]

Although the minutes of the preliminary examination are not certified as provided in this section, if the grand jury acts thereon and returns proper memorandum thereof with the indictment, defendant cannot object to the examination of the witnesses whose testimony is thus returned and whose names are endorsed on the indictment. *State v. Turner*, 114-426.

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**CHAPTER 13.**
**OF IMPANELING THE GRAND JURY.**

**SECTION 5240. Drawing.** At the term of court at which grand jurors are required to appear, the names of the twelve persons constituting the panel of the grand jury shall, on the second day of each term of court, unless otherwise ordered by the court or judge, be placed by the clerk in a box, and after thoroughly mixing the same, he shall draw therefrom seven names, and the persons so drawn shall constitute the grand jury for that term. Should any of the persons so drawn be excused or fail to attend on said second day of the court, the clerk shall draw other names until the seven grand jurors are secured. If, for any reason, the number of grand jurors required is not secured from the twelve persons so constituting such panel, the clerk shall draw from the grand jury list, provided for by section three hundred and thirty-eight of the code such number of names as the court may direct, and from the persons whose names are so drawn the panel of the grand jury for the term shall be filled, and the court shall issue a venire to secure their attendance. [21 G. A., ch. 42, § 3; C. '73, §§ 4255-6; R., §§ 4608-9; C. '51, § 2881.] [27 G. A., ch. 114, § 1.]

For annotations, see code, page 1999.—Ed.]

**SEC. 5241. Challenge to panel—motion.**

[For earlier annotations, see code, pages 2001-2.—Ed.]

The objection that two members of the grand jury were residents of the same township will be waived if not urged before pleading to the indictment unless it appears that defendant did not know of the irregularity before pleading. *State v. Kouhns*, 103-720.

**SEC. 5243. Grounds for challenge.**

[For earlier annotations, see code, pages 2002-3.—Ed.]

The fact that a grand juror has formed or expressed an unqualified opinion is not recognized as a sufficient ground for setting aside the indictment. *State v. Baughman*, 111-71.

**SEC. 5246. To individual juror.** If a challenge to an individual grand juror be allowed, he shall not be present at or take any part in the consideration of the charge against the defendant. If a challenge to the panel is allowed, or if by reason of challenges to individual grand jurors being allowed, or if for any cause at any time, the grand jury is reduced to a less number than seven, a new grand jury shall be impaneled to inquire into the charge against the defendant in whose behalf the challenge to the panel has been allowed, or the panel of the jury so reduced below the number required by law shall be filled as the case may be. If a challenge is allowed to the panel the names of jurors required to impanel a new jury shall be drawn from the grand jury list. If such grand jury has been reduced to a less number than seven by reason of challenges to individual jurors being allowed, or from any other cause, the additional jurors required to fill the

panel shall be summoned, first, from such of the twelve jurors originally summoned which were not drawn on the grand jury as first impaneled, or excused, and if they are exhausted, the additional number required shall be drawn from the grand jury list and the court shall, when necessary, issue a venire to secure the attendance of such additional jurors. The persons so summoned shall serve only in the case, or cases, in which, by reason of challenges, or other causes, the regular panel is set aside or is insufficient in number to find an indictment. [C. '73, § 4264; R., § 4617; C, '51, § 2888.] [27 G. A., ch. 114, § 2.]

[For earlier annotations, see code, page 2003.—Ed.]

Where a grand juror has been directed on account of challenge for cause not to take part in considering the case, it will be presumed, in the absence of a showing to the contrary, that he obeyed the direction, although as foreman he has signed the endorsement on the back of the indictment. *State v. Lightfoot*, 107-344.

### SEC. 5252. Discharge.

[For earlier annotations, see code, page 2004.—Ed.]

This provision relates to the discharge of the grand jury for the term, and it does not limit the authority of the court to excuse the jurors temporarily, or until required again at the same term. *State v. Phillips*, 89 N. W., 1092.

## CHAPTER 14.

### OF THE DUTIES OF THE GRAND JURY.

#### SECTION 5254. Evidence.

[For earlier annotations, see code, page 2004.—Ed.]

Failure of the grand jury to swear a witness who testifies will not authorize the setting aside of the indictment on motion, under Code § 5319. *State v. Easton*, 113-516.

#### SEC. 5256. Clerk.

[For earlier annotations, see code, page 2005.—Ed.]

The clerk may be called as a witness to state what was testified to by a witness before the grand jury with a view of impeaching the evidence of such witness given on the trial. *State v. McPherson*, 114-492.

**SEC. 5258. Minutes to be kept.** The clerk of the grand jury shall take and preserve minutes of the proceedings and of the evidence given before it, except the votes of its individual members on finding an indictment. When the evidence is taken, it shall be read over to and signed by the witness. When an indictment is found, all minutes and exhibits relating thereto shall be returned therewith and filed by the clerk of the court. [25 G. A., ch. 71; 22 G. A., ch. 38; C. '73, § 4275; R., § 4629.] [28 G. A., ch. 134, § 1.]

Minutes of the evidence of a witness, signed by him, may be introduced in a civil suit by the opposite party as declarations against interest. *Steele Smith Groc. Co. v. Potthast*, 109-413.

Where the minutes are attached to the indictment and filed with it, that is sufficient, but they are no part of the indictment, and if not filed with the indictment should be separately filed. Failure, however, to mark the minutes which were duly taken and returned, as filed will not warrant the exclusion of the testimony of the witnesses whose testimony is so returned. *State v. Doss*, 110-713.

#### SEC. 5260. Member as witness.

The provisions that a grand juror may be a witness under this section precludes the notion of an absolutely impartial trial

before the grand jury. *State v. Baughman*, 111-71.

**SEC. 5268. Secrecy of proceedings—exception.**

[For earlier annotations, see code, page 2006.—Ed.]

Possibly the cases in which the grand jury may be required to disclose testimony given before the grand jury, as authorized by the common law, are limited to the two specified in this section. But as there is no statutory provision with reference to testimony by the clerk appointed under Code § 5256, such clerk may testify as to proceedings before the grand jury when-

ever necessary in the administration of justice, as was the rule at common law. Therefore, held, that the clerk might be required to disclose the evidence of a witness before the grand jury for the purpose of impeaching the testimony of such witness on the trial. *State v. McPherson*, 114-492.

**SEC. 5272. Minutes of preliminary examination.**

[For earlier annotations, see code, page 2007.—Ed.]

The statute does not require that the substance of the evidence of the witness be preserved, but only that a brief minute thereof be made. *State v. Wrand*, 108-73.

Defendant cannot object that the transcript of the evidence taken in the preliminary examination, instead of minutes thereof, is returned with the indictment,

nor that the minutes of the preliminary examination, acted on by the grand jury, were not certified as required by Code § 5228. *State v. Turner*, 114-426.

Where a case is resubmitted to the grand jury there is no final judgment from which the state may appeal. *State v. Evans*, 111-80.

## CHAPTER 15.

### OF THE FINDING AND PRESENTATION OF INDICTMENT.

**SECTION 5274. How found—indorsement.**

[For earlier annotations, see code, page 2008.—Ed.]

The endorsement "a true bill" must be made by the foreman, although he may not have approved the indictment or be qualified to act as grand juror in the case. And

it will not be presumed from his endorsement that he disregarded an injunction of the court not to take part in considering the case. *State v. Lightfoot*, 107-344.

**SEC. 5274-a. Repeal—how found—indorsement.** That section five thousand two hundred and seventy-four (5274) of the code be, and the same is hereby repealed and the following enacted in lieu thereof:

An indictment cannot be found without the concurrence of five grand jurors. Every indictment must be indorsed "A true bill" and the indorsement signed by the foreman of the grand jury. [27 G. A., ch. 115, § 1.]

**SEC. 5275. Private prosecutor.**

[For earlier annotations, see code, page 2008.—Ed.]

Where an indictment is not endorsed as found at the instance of a private prosecutor, costs cannot be taxes to the person at whose instance the indictment was found. *State v. McAllister*, 107-641.

The basis of the court's right to tax the costs of a criminal prosecution to an individual as prosecuting witness is the action

of the grand jury in returning the fact that an indictment is found at the instance of such person. When the grand jury fails to make a finding and endorsement of that fact, as provided for by statute, the court lacks jurisdiction to tax the costs to a person as prosecutor. *McAllister v. Johnson*, 108-42.

**SEC. 5276. Names of witnesses indorsed.**

[For earlier annotations, see code, pages 2009-10.—Ed.]

It is not necessary to return with the indictment documentary evidence which was before the grand jury nor is it required that such evidence be noted on the indictment. *State v. Boomer*, 103-106.

The evidence of a witness before the grand jury may be proven by persons who

heard such evidence, the minutes of the grand jury not being competent evidence as to the fact. *State v. Porter*, 105-677.

The minutes of the evidence need not be attached to the indictment, but if so attached and filed, that is sufficient. *State v. Doss*, 110-713.

**SEC. 5277. Minutes of evidence.**

This section does not preclude the use of the minutes of the evidence before the grand jury for the purpose of establishing the declarations of a witness against his interest. *Steele Smith Groc. Co. v. Pott-hast*, 109-413.

**CHAPTER 16.****OF THE INDICTMENT.****SECTION 5279. Defined.**

The minutes of evidence are not a part of the indictment, but are to be separately filed. If, however, it appears that such minutes were in fact returned with the indictment and attached to it when filed by the clerk that is sufficient. *State v. Doss* 110-713.

**SEC. 5280. What must contain.**

[For earlier annotations, see code, page 2011.—Ed.]

The purpose of these statutory provisions as to the sufficiency of indictments is to dispense with those technical rules of the common law which sometimes prevented the disposition of cases upon their merits, wherever the same can be done without prejudice to the rights of the parties. *State v. Fisher*, 106-658.

Therefore, held, that in an indictment for larceny of money, it was sufficient to describe the property as "twenty-two dollars and fifty cents in lawful money of the United States of the value of twenty-two dollars and fifty cents." *Ibid.*

An indictment under the statute defining the offense of procuring an abortion should, negative the exception found in the statute of cases where miscarriage is necessary to save the woman's life. *State v. Aiken*, 109-643.

If the facts stated do not constitute a crime, the indictment cannot be aided by intentment, or its omission supplied by construction. *State v. Jamison*, 110-337.

An indictment is sufficient if drawn in

such manner as to enable a person of common understanding to know what is meant. *State v. Pinckney*, 111-34.

An indictment in the language of the statute is sufficient when it so far individuates the offense that the offender has proper notice from the statutory terms of the particular crime charged. *State v. Turner*, 114-430.

In charging assault with intent to commit rape it is not necessary to specify the method or means of the assault. *Ibid.*

Much of what was required in an indictment at common law is dispensed with under our statute. It is now only necessary to set out the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is meant, and, held, that in an indictment for assault with intent to commit murder it is not necessary to state the instrument or means used to effectuate the purpose. *State v. Shunka*, 89 N. W., 977.

**SEC. 5282. Direct and certain.**

[For earlier annotations, see code, pages 2012-13.—Ed.]

Where the statute makes an act criminal when done maliciously, it is not sufficient to charge that it was done unlawfully and wilfully. *State v. Lightfoot*, 107-344.

Where the offense involves the element of knowledge, it is not sufficient that the act is charged to have been unlawfully or wilfully done. *State v. Perry*, 109-353.

Where in two counts the offense of keeping a liquor nuisance was so charged as that there might be a conviction under one count which could not be sustained under the other, held that the indictment was not sufficiently direct and certain. *State v. Schuler*, 109-111.

**SEC. 5284. Must charge but one offense.**

[For earlier annotations, see code, pages 2013-16.—Ed.]

Where the offense is not a continuing one, and the evidence introduced tends to show distinct transactions, the defendant has the right to require an election on the part of the state as to which transaction is relied upon. *State v. Jamison*, 110-337.

An indictment for rape which also charges an assault as a part of that crime is not objectionable for duplicity. *State v. Peterson*, 110-647.

It does not constitute duplicity in an indictment to charge the defendant with

committing a criminal act, and also with conniving at and encouraging such act. *State v. Easton*, 113-516.

In an indictment for obtaining a signature by false pretenses, different and even inconsistent means of accomplishing the object may be charged, in the indictment without rendering it objectionable on the ground of duplicity. *State v. Tripp*, 113-698.

#### SEC. 5285. Time.

[For earlier annotations, see code, pages 2016-17.—Ed.]

The fact that the evidence points to the commission of the crime at a particular date does not render an instruction erroneous, which tells the jury that the crime need not be proven to have been committed on the day alleged and that it is sufficient if it is proven to have been committed within the statutory period of limitations. *State v. Hayes*, 105-82.

In a prosecution for adultery the state may prove the act charged as committed at

Where an indictment for using false weights under Code § 5044, which does not describe a continuing offense, alleged the use of such false weights in weighing divers cattle and hogs with intent to defraud divers citizens, held, that the indictment was bad for duplicity. *State v. Jamison*, 90 N. W., 622.

any time within the statutory period of limitation. *State v. Smith*, 108-140.

If time is necessary to be considered in determining the jurisdiction of the court, it is a material ingredient of the offense, and where the jurisdiction of the court to punish the offense charged is acquired by a statute, the time of the criminal act charged in the indictment must be so alleged as to show that it was committed after the statute took effect. *State v. Dale*, 110-215.

#### SEC. 5286. Name of person injured.

[For earlier annotations, see code, pages 2017-18.—Ed.]

An erroneous allegation as to the name of the person injured will not vitiate the indictment. So, held, where the indictment charged larceny of property from a corporation but did not allege the fact of its incorporation. *State v. Fogarty*, 105-32.

Erroneously naming the person injured will not be a ground for striking out evidence which relates to the real person intended where the defendant is in no way prejudiced by the variance. *State v. Carnagy*, 106-483.

If the indictment charges an offense, and, from the facts and evidence, the court is satisfied that defendant was not misled, the giving of an unauthorized name to the person against whom the crime was committed is immaterial, and facts outside the

indictment may be considered in determining whether the defendant understood the specific charge intended to be made. So, held, where in an indictment for murder of an unnamed bastard the grand jury without any authority designated the bastard by a name compounded of the names of its parents. *State v. Cunningham*, 111-233.

The erroneous statement of the name of the owner of the premises where burglary is committed will not be fatal. *State v. Wrand*, 108-73.

The fact that an indictment for larceny lays the ownership of the property stolen jointly in the owners thereof, whereas it is owned by them in severalty, will not be a fatal defect. *State v. Oongrove*, 109-66.

#### SEC. 5288. Words of statute.

[For earlier annotations, see code, pages 2018-19.—Ed.]

It is sufficient to follow the language of the statute where the statute so far individuates the offense that the offender has proper notice from the statutory terms of the particular crime charged. *State v. Porter*, 105-677.

An indictment is sufficient if it charges the offense in the language of the statute when that shows the material facts which constitute the offense. So, held, in regard to an indictment charging indecent expo-

sure of the person. *State v. Baugness*, 106-107.

While an indictment following the language of the statute may not be sufficient, in some cases, for the reason that the statute does not set forth all the elements necessary to constitute the offense, yet, where the acts constituting the offense are stated, and every element of the crime appears, the indictment will be sufficient. *State v. Dankwardt*, 107-704.

#### SEC. 5289. What indictment must show.

[For earlier annotations, see code, pages 2019-22.—Ed.]

Although it is sufficient in an indictment for keeping a liquor nuisance to charge the keeping of such nuisance in the county of

the prosecution, yet, if the place is more particularly charged, it must be proven as charged. *State v. Schuler*, 109-111.

Where the state relies on evidence that the offense was committed within five hundred yards of the boundary line of the county, it may be averred generally that it was committed within the county, but an indictment containing the allegation that the crime was committed in "Iowa county or in Keokuk county, within five hundred yards of the south line of Iowa county, as nearly as the grand jury know and can state," is defective. *State v. Daily*, 113-362.

In a particular case held that the allegation of attempt to improperly influence a juror was sufficiently charged without pleading the evidence showing that there was such improper attempt, where the means used was stated. *State v. Dankwardt*, 107-704.

Where the charge is seduction, the allegation that the person seduced was "an unmarried person" sufficiently charges the seduction of an unmarried woman. *State v. Olson*, 108-667.

### SEC. 5290. Immaterial matters.

[For earlier annotations, see code, pages 2022-3.—Ed.]

**Venue.** An indictment for maintaining a liquor nuisance "at said building or place in said county" held sufficiently definite. *State v. Dixon*, 104-741.

An indictment is not bad for uncertainty which, in charging the maintenance of a nuisance, alleges that defendant unlawfully established, kept, etc., and continued "a certain building or place," etc., for the purpose, etc. Allegation of place is not essential in such an indictment. *State v. Dixon*, 104-741.

The words "then and there" in an indictment held to refer back to the place where the act was done as charged in the venue, and not to the place named in connection with the description of the property. *State v. Tripp*, 113-698.

**Ownership.** An erroneous allegation with reference to ownership is not fatal under statutory provisions if the crime is described in other respects with sufficient certainty. *State v. Watson*, 102-651.

Variance as to name of the owner of property in a prosecution for burglary will not be fatal. *State v. Wrand*, 108-73.

**Description.** Under an indictment for fraudulent banking charging the defendant

The use in an indictment of the term "planing mill," in charging the offense of breaking and entering a building sufficiently implies that a building was broken and entered. *State v. Haney*, 110-26.

The use of Roman numerals and Arabic figures and the character "&" for "and" do not affect the validity of the indictment. *State v. McPherson*, 114-492.

It is not improper to charge an assault as having been made with a deadly weapon, the particular description of which is to the grand jury unknown, although the weapon with which it is claimed the crime was committed was before the grand jury and also introduced in evidence on the trial. *State v. Sigler*, 114-408.

Section applied. *State v. Wood*, 112-411; *State v. Ryan*, 113-536.

As to following the language of the statute in charging an offense, see notes to Code § 5288, in this Supplement.

with knowingly and unlawfully receiving on deposit the sum of two hundred dollars in lawful money of the United State a particular description of which was to the grand jurors unknown, held, that it was unnecessary to prove that the money received was any particular kind of money and that the words "of the United States" might be rejected as surplusage. It might be that if some particular kind of money were specially described such as gold coin or treasury notes of a particular denomination it would be necessary to prove the description as alleged. *State v. Boomer*, 103-106.

**Surplusage.** An indictment charging the publication of an alleged libel for the purpose of defaming, etc., a person named "and others", and that such publication tended to provoke the said person named "and others" to wrath, etc., is not objectionable, the words "and others" being surplusage. *State v. Heacock*, 106-191.

The word "Jr." added to the name of a person as given in the indictment adds nothing thereto, and should be regarded as surplusage. *State v. Dankwardt*, 107-704.

### SEC. 5296. Indictment for perjury.

[For earlier annotations, see code, page 2024.—Ed.]

The indictment need not set forth the pleadings, records or proceedings with which the oath was connected. It is sufficient to state the substance of the controversy or matter in respect to which the offense was committed, and to charge that the offense was one which the court in which

the case was tried had lawful power and authority to investigate. It is sufficient to allege generally that the testimony was material. *State v. Booth*, 88 N. W., 344.

[The notes in the Code to § 5096 under the heading "Knowledge of falsity" belong under this section.]

**SEC. 5299. Principal and accessory.**

[For earlier annotations, see code, page 2025.—Ed.]

One may be guilty as accessory before the fact of a crime which he is not capable of committing. By aiding and abetting in the commission of a crime he renders himself principal therein under the statutory provisions. So held as to a defendant who, though not a public officer, was guilty of aiding and abetting the crime of embezzlement committed by a public officer. *State v. Rowe*, 104-323.

Where one is charged with an offense which is accessorial in its nature it is not necessary to state the method of aiding and abetting, but it is sufficient to charge him as principal by procuring the act to be done. *State v. Porter*, 105-677.

All persons concerned in the commission of the offense, including so called co-conspirators or confederates, are guilty as principals and may be charged and held

as such. A prosecution in which persons aiding and abetting are sought to be held as co-conspirators is not a prosecution for conspiracy but for the crime committed. *State v. Smith*, 106-701.

The words "aid and abet in its commission" as used in this section manifestly have reference to some work or act of encouragement or assistance in the commission of the offense, and not to something done after the crime is completed. An accessory after the fact is not an aider and abettor. *State v. Jones*, 88 N. W., 196.

The fact of defendant's presence may alone, under some circumstances, show his guilt as aiding and abetting. *State v. Dunn*, 89 N. W., 984.

One may be guilty as accessory before the fact to the crime of manslaughter. *State v. Gray*, 89 N. W., 987.

**SEC. 5300. Accessory after the fact.**

An accessory after the fact to the commission of a crime, for instance one who has received stolen property from the thief with knowledge of the theft, is not an ac-

complice, under Code § 5480, requiring corroboration of the evidence of an accomplice to sustain a conviction. *State v. Jones*, 88 N. W., 196.

**SEC. 5302. Indictment for embezzlement.**

Under a charge in an indictment for embezzlement that defendant did receive different amounts of money, said sums amounting to a total of a certain number of dollars named, the particular descrip-

tion of said money being to the grand jury unknown, held, that the description as to the money was sufficient without other allegation of its value. *State v. Alverson*, 105-152.

## CHAPTER 18.

## OF ARRAIGNMENT OF THE DEFENDANT.

**SECTION 5314. Fee for attorney defending.**

[For earlier annotations, see code, page 2029.—Ed.]

The statute does not authorize the payment by the county of compensation to defendant's attorney for services rendered on appeal. *State v. Young*, 104-730.

Where one attorney is appointed to defend two persons, jointly indicted, he is entitled to the statutory fee for the defense of each. *Clark v. Osceola County*, 107-502.

An attorney selected in the lower court may follow the case to the supreme court, and is entitled to compensation if he has not received, and is not to receive it di-

rectly or indirectly from another source. But the claim for services rendered in the supreme court should be presented to the board of supervisors for allowance as other claims against the county. *State v. Behrens*, 109-58.

There is no power in the district court to appoint an attorney to prosecute an appeal, but the attorney appointed in the lower court may prosecute an appeal and be allowed compensation therefor. *State v. Cater*, 109-69.

## CHAPTER 19.

## OF SETTING ASIDE THE INDICTMENT.

**SECTION 5319. Grounds.**

[For earlier annotations, see code, pages 2030-2.—Ed.]

The grounds specified on which a motion may be based to set aside an indict-

ment are exclusive of others not named, and therefore the fact that a member of

the grand jury finding the indictment had previously formed and expressed an unqualified opinion of defendant's guilt will not require the setting aside of the indictment. *State v. Baughman*, 111-71.

Where father and daughter were both witnesses before a grand jury on the investigation of a public charge, and the father remained with the daughter in the grand jury room, while she was being sworn, on account of her nervousness, held that there was not such improper conduct

as to require the setting aside of the indictment. *State v. Wood*, 112-484.

An indictment will not be set aside on motion on the ground that a witness testifying before the grand jury was not sworn. *State v. Easton*, 113-516.

There is no provision for setting aside an indictment because defendant was given no opportunity to challenge the grand jurors individually. *State v. Phillips*, 89 N. W., 1092.

### SEC. 5321. Objections to selection of grand jury.

[For earlier annotations, see code, page 2033.—Ed.]

Objections to an individual grand juror that he had formed or expressed an unqualified opinion is not available by way of

motion to set aside the indictment. *State v. Baughman*, 111-71.

### SEC. 5324. If granted.

[For earlier annotations, see code, page 2033 —Ed.]

Where a case is resubmitted to the grand jury there is no final judgment from which

the state may appeal. *State v. Evans*, 111-80.

### SEC. 5326. Order to set aside, no bar.

This section relates to the setting aside of indictments on motion and not to indict-

ments held to be insufficient on demurrer. *State v. Fields*, 106-406.

## CHAPTER 20.

### OF PLEADING BY THE DEFENDANT.

#### SECTION 5328. Grounds of demurrer.

[For earlier annotations, see code, page 2034.—Ed.]

The objection that the indictment does not charge a crime should be raised by demurrer and not by motion to set aside the indictment. *State v. Kimble*, 104-19.

The court may on its own motion without a request from either party discharge the jury if it appears that the indictment

is so defective that a conviction thereunder could not be sustained and the defendant should thereupon be discharged from custody unless the court believes that a new indictment could be framed on which the defendant could be convicted. *Ibid*.

#### SEC. 5331. When heard.

[For earlier annotations, see code, page 2035.—Ed.]

Where a demurrer to an indictment is sustained on the ground that the indictment contains matter which is a legal defense or a bar to the indictment, the judgment is final; and, held, that although the order made on the ruling was not in the form of a judgment but in terms dis-

charged the defendant and released his bond, it was in legal effect a final judgment. *State v. Fields*, 106-406.

Where a demurrer is sustained and the case is resubmitted there is no final judgment from which the state can appeal. *State v. Evans*, 111-80.

#### SEC. 5334. Entry of plea—form—guilty.

[For earlier annotations, see code, page 2035.—Ed.]

Where the indictment contains two counts of such character that they cover two distinct offenses, and defendant pleads

"guilty of the offense charged," a judgment on such plea is erroneous. *State v. Schuler*, 109-111.

**SEC. 5339. Conviction or acquittal, when a bar.**

[For earlier annotations, see code, pages 2037-8.—Ed.]

Where defendant pleads previous conviction, the state may show that the conviction relied on was void for want of jurisdiction in the court in which the conviction was had. *State v. Jamison*, 104-343.

No replication to the affirmative plea of previous conviction or acquittal is necessary. *Ibid.*

When the plea of previous conviction is not sustained by the evidence or is not sufficient in law the court may so charge the jury. *Ibid.*

Where, after defendant was put on trial under an indictment in one county, and evidence was introduced, some of it tending to show that a crime had been committed in that county, the court dismissed the

prosecution and ordered the defendant to be held for a warrant from another county for the same offense, held, that as the question of venue should have gone to the jury in the first county, the defendant could in the second county plead the proceedings in the first county as a former adjudication. *State v. Spayde*, 110-726.

While in general an acquittal in a criminal case is not a bar to a subsequent civil action founded on the same facts, yet, where the civil action is to secure a forfeiture which would have been a part of the penalty to be imposed in the criminal proceeding, and is between the same parties, the previous acquittal is a bar. *State v. Meek*, 112-338.

**SEC. 5341. Judgment, when a bar.**

The district court may order a resubmission of the case to the grand jury when the demurrer to the indictment has been sustained on the ground that the offense charged was within the exclusive juris-

diction of another county, or on the ground that the indictment contains matter which is a legal defense or bar to the indictment. *State v. Fields*, 106-406.

**CHAPTER 21.****OF CHANGE OF PLACE OF TRIAL IN CRIMINAL CASES.****SECTION 5343. Application—what stated.**

[For earlier annotations, see code, page 2039 —Ed.]

Affidavits in a particular case, held not to show prejudice or excitement in the county against defendant such as to require a change of venue. *State v. McDonough*, 104-6.

An application for transfer of a criminal case to another judge of the same district

for trial on the ground that the judge to whom the application is addressed is prejudiced against defendant to such an extent that he cannot obtain a fair and impartial trial before him, is to be granted or refused in the exercise of sound discretion. *State v. Heacock*, 106-191.

**SEC. 5348. Court's discretion.**

[For earlier annotations, see code, pages 2040-1.—Ed.]

The supreme court will not on appeal interfere with the discretion vested in the trial court in passing upon an application for a change of venue, unless such discretion appears to have been abused. *State v. Miner*, 107-656.

A certain discretion is reposed in the trial court passing upon applications of

this kind, and the supreme court does not interfere unless such discretion appears to have been abused. In a particular case, held, that the showing was not such as to require reversal of the action of the trial court in refusing a change of venue on account of prejudice of the inhabitants of the county. *State v. Williams*, 88 N. W., 194.

**SEC. 5354. Cost of change.**

[For earlier annotations, see code, pages 2042-3.—Ed.]

As the cost of employing an additional attorney to assist in trying a case brought to a county on change of venue falls upon the county from which the change is taken, the board of supervisors of the latter county has authority to employ an additional attorney and may contract with the attorney of that county to render the services. *Bevington v. Woodbury County*, 107-424.

It is the court of the county in which

the case is tried which must allow the costs necessary and consequent upon the trial, and the county to which the change is taken is primarily liable to pay the expense of providing an attorney for defendant, and of furnishing defendant a transcript for the purpose of appeal, when ordered by the trial judge. *State v. Cater*, 109-69.

## CHAPTER 23.

## OF CHALLENGING THE JURY.

**SECTION 5360. For cause.**

[For earlier annotations, see code, pages 2044-6.—Ed.]

**Objection stated.** A challenge to a juror should distinctly specify the facts constituting the causes thereof. *State v. Young*, 104-730.

In a particular case, held, that the fact that the juror had read newspaper accounts of the crime for which defendant was on trial did not disqualify him. *Ibid.*

Where the challenge of the state is sustained, there being evidently but one ground of objection to the juror, and this being sufficient, the case will not be reversed on the ground that the objection is not sufficiently specific. *State v. Prins*, 113-72.

**Having formed or expressed an opinion.** Every one who says he has formed an opinion from what he has heard and read is not necessarily disqualified. The appearance and intelligence, or want of intelli-

gence, of the juror as he appears before the court may be taken into account. It is the duty of the court, not of the juror, to determine whether his opinion disqualifies him. *State v. Hudson*, 110-663.

The fact that a juror has heard statements as to the crime, without expressing any opinion, does not necessarily render him incompetent. *State v. Geier*, 112-706.

Although the juror admits having formed an opinion, yet, if upon the whole examination it appears that such opinion is qualified, and the juror expresses himself as able to render a just and fair verdict on the evidence, guided by the instructions of the court, he is qualified. *State v. Williams*, 88 N. W., 194.

As to new trial on account of disqualification of juror, see notes to Code § 5424, in this Supplement.

**SEC. 5361. Juror examined.**

[For earlier annotations, see code, page 2046.—Ed.]

The fact that a juror is not sworn on his *voir dire* will not deprive the defendant of the right to have a new trial on showing that the juror was prejudiced

against him and made false answers as to having formed or expressed an opinion. *State v. Wright*, 112-436.

**SEC. 5365. Number of challenges.**

[For earlier annotations, see code, page 2047.—Ed.]

Where two or more defendants are tried jointly, the number of peremptory challenges is limited to the number which a

single defendant might exercise. *State v. Wolf*, 112-458.

## CHAPTER 24.

## OF THE TRIAL TO A JURY.

**SECTION 5370. Continuances.**

[For earlier annotations, see code, pages 2047-8.—Ed.]

The provision that a continuance on the ground of the absence of a witness shall not be granted if the opposite party will admit that the witness if present would testify as stated in the affidavit for continuance, is not unconstitutional as ap-

plied to a continuance asked by the defendant, even though by the admission of the state, defendant is thereby deprived of the presence of the witness whose expected testimony is set out in the affidavit. *State v. Wittsey*, 103-54.

**SEC. 5371. Provisions as to trial in civil cases.**

The provisions of Code § 3709 as to taking exceptions to instructions are appli-

cable to criminal cases. *State v. Williams*, 88 N. W., 194.

**SEC. 5372. Order of trial.**

[For earlier annotations, see code, pages 2048-50.—Ed.]

Although defendant relies on insanity as a defense, the state still has the burden of proof as to the commission of the crime,

and the defendant does not have the right to open and close. *State v. Robbins*, 109-650.

The provision that when the evidence is concluded the county attorney must commence and conclude the argument does not exclude the making of the opening and the concluding arguments by an attorney employed by private parties to assist the county attorney. *State v. Novak*, 109-717.

In the opening statement the county attorney should not anticipate possible attempts of the defense to avoid liability. The statements should be confined to the evidence which the prosecution expects to

introduce to sustain the indictment. *State v. Ryan*, 113-536.

The judge should not during the argument of the case be beyond the hearing of the proceedings. There can be no court without a judge and his presence as the presiding genius of the trial is as essential at one time as another. *State v. Carnagy*, 106-483.

Further, as to absence of judge from court room during argument as ground for new trial, see notes to Code § 5424, in this Supplement.

**SEC. 5373. Evidence for state—notice.** The county attorney, in offering the evidence in support of the indictment in the order prescribed in the last section, shall not be permitted to introduce any witness who was not examined before a committing magistrate or the grand jury, and the minutes of whose testimony were not presented with the indictment to the court, unless he shall have given to the defendant or his attorney of record if the defendant be not found within the county a notice in writing, stating the name, place of residence and occupation of such witness, and the substance of what he expects to prove by him on the trial, at least four days before the commencement of such trial. Whenever the county attorney desires to introduce evidence to support the indictment, of which he shall not have given said four days' notice because of insufficient time therefor since he learned said evidence could be obtained, he may move the court for leave to introduce such evidence, giving the same particulars as in the former case, and showing diligence such as is required in a motion for a continuance, supported by affidavit, whereupon, if the court sustains said motion, the defendant shall elect whether said cause shall be continued on his motion, or the witness shall then testify; and if said defendant shall not elect to have said cause continued, the county attorney may examine said witness in the same manner and with same effect as though four days' notice had been given defendant or his attorney as hereinbefore provided, except the county attorney, in the examination of witnesses, shall be strictly confined to the matters set out in his motion. [17 G. A., ch. 168, § 3; C. '73, § 4421; R., § 4786.] [28 G. A., ch. 135, §§ 1, 2.]

[For earlier annotations, see code, pages 2050-3.—Ed.]

**Duty to call witnesses.** The state is not bound to call as witnesses all the persons examined before the grand jury, even though it appears that they were witnesses to the criminal act. *State v. Hudson*, 110-663.

**Documentary or real evidence.** It is not necessary to give notice of what is expected to be proved by documentary evidence, such evidence is not required to be indorsed on the indictment or returned as part of the minutes. *State v. Boomer*, 103-106.

Articles of personal property may be offered in evidence without having been before the grand jury or notice of the intent to introduce them having been given to the defendant. *State v. Berger*, 90 N. W., 621.

**Witnesses not examined.** The statutory provision as to returning minutes of evidence with the indictment does not preclude the use of evidence other than the minutes in order to determine whether

the witness was in fact examined before the grand jury or committing magistrate. *State v. Marshall*, 105-38.

Where the names of witnesses are indorsed on the indictment and minutes of their evidence returned therewith it is presumed their evidence was properly before the grand jury and, to overcome such presumption, it must be made affirmatively appear not only that they did not testify before the grand jury but also that they either did not give evidence before the committing magistrate or else that the minutes thereof made by him were not used by the grand jury. *Ibid.*

While the minutes of the evidence are not a part of the indictment, and should be separately filed, yet, if attached to the indictment and filed with it, this is sufficient. *State v. Doss*, 110-713.

**Indorsement of name.** A variance between the name of the witness as indorsed on the indictment and his true name is not a valid objection to an examination of the

witness, unless defendant has been misled or prejudiced by the variation. *State v. Dale*, 109-97.

**Notice.** The fact that a witness states his occupation to be different from that named in the notice is not conclusive that the notice is not sufficient. *Ibid.*

Whether the state is entitled to examine the witness under the notice is a question for the court. *Ibid.*

The notice in a particular case held not defective in failing to accurately describe the occupation of the witness named. *State v. McPherson*, 114-492.

Where the notice gave the name of the witness as "Lee Wood," and his occupation

as that of a laborer, held, that it was sufficient where it appeared that he commonly went by that name, although his real name was Ernest Lee Wood, and he was at the time confined in the county jail. *State v. Dunn*, 89 N. W., 984.

The examination need not be limited to the matters stated in the notice. It is sufficient if it directs the defendant's attention to such matters and enables him to produce such other witnesses as he may desire with reference to the same subject. *State v. Boomer*, 103-106.

The notice here contemplated may be given on Sunday. *State v. Ryan*, 113-536.

### SEC. 5375. Separate trials.

[For earlier annotations, see code, page 2053.—Ed.]

Where the offense charged in an indictment is a misdemeanor, the matter of granting separate trials is within the discretion of the court. *State v. Jamison*, 110-337.

Where a felony is charged, each one of joint defendants is entitled to a separate trial as an absolute right, and by exercis-

ing this right he can avail himself of the full number of peremptory challenges provided by law, but if a separate trial is not asked, the number of peremptory challenges is limited to the number allowed where only one defendant is on trial. *State v. Wolf*, 112-458.

### SEC. 5376. Reasonable doubt.

[For earlier annotations, see code, pages 2053-9.—Ed.]

**Definition.** An instruction that "if after a careful comparison of the evidence and a full consideration of the whole case your minds are brought to an abiding conviction beyond a reasonable doubt," etc., is sufficient, without making use of the words "to a moral certainty." *State v. Van Tassel*, 103-6.

Absolute certainty is not required and is rarely if ever possible in any case and to justify a conviction the evidence, when taken as a whole and fairly considered, must so satisfy the judgments and consciences of the jurors as to exclude every other reasonable conclusion. Certainty is seldom possible and never required, but the conclusion must be so certain as to exclude any other reasonable hypothesis. *State v. Marshall*, 105-38.

Not all the facts involved in the case, but only those essential to conviction must be established beyond a reasonable doubt, and be incompatible with any reasonable hypothesis of innocence. *State v. House*, 108-68.

It is not necessary that each essential fact in the chain of circumstances solely relied on to connect the accused with the commission of the offense, when separately considered, be found beyond reasonable doubt. Such a fact, though having little to sustain it when standing alone, may derive such support from others immediately connected therewith as to exclude all doubt of its existence. Nevertheless, if conviction depends entirely on different circum-

stances, arranged linkwise, connecting the defendant with the crime charged, then each and every one of these must be established beyond a reasonable doubt, for no chain can be stronger than its weakest link. *State v. Cohen*, 108-208.

It is not necessary that each of the essential facts in the case, standing isolated and alone, be proven beyond a reasonable doubt, nor that it be established by independent evidence. The material circumstances, when given their respective places in the sequence of events, may strengthen and support each other to such an extent that on a consideration of the whole case the jury may be convinced beyond a reasonable doubt of defendant's guilt. *State v. Hossack*, 89 N. W., 1077.

**Instructions.** The charge is to be taken as an entirety and it is not always necessary to explain the bearing of the doctrine of reasonable doubt in connection with each instruction. *State v. Heacock*, 106-191.

It is error to instruct the jury that a reasonable doubt is such a doubt as the jury are able to give a reason for. Such an instruction casts the burden of furnishing reasons for not finding guilt established upon the defendant, whereas it is upon the state to make out a case excluding all reasonable doubt. Besides, jurors are not bound to give reasons to others for the conclusion reached. *State v. Cohen*, 108-208.

It is error to instruct that "a reasonable doubt does not mean a doubt from mere caprice or groundless conjecture, but it means a reasonable doubt such as the jury are able to give a reason for." *State v. Lee*, 113-348.

It is not necessary to instruct the jury to the effect that so long as any one juror has a reasonable doubt of guilt there can be no conviction. *State v. Penney*, 113-691.

Instructions in a particular case as to reasonable doubt, held, not erroneous. *State v. Novak*, 109-717; *State v. Ryan*, 113-536.

**Burden of proof as to insanity.** The fact that defendant relies on insanity as a defense does not relieve the state of the burden of proving the commission of the crime beyond a reasonable doubt. *State v. Robbins*, 109-650.

**Burden of proving alibi.** While, as a distinct issue, an alibi must be established by a preponderance of the evidence, or it may be disregarded, yet if the evidence offered to show it falls short of this in weight, nevertheless such evidence is for the consideration of the jury, and if upon the whole case, including that part pertaining to the alibi, the jurors have a reasonable doubt of defendant's guilt, he should be acquitted. *State v. McGarry*, 112-709.

Even though the evidence as to alibi is not sufficient to establish that defense by a preponderance of the evidence, nevertheless the jury should be instructed to take such evidence into account in determining whether the guilt of the defendant is established beyond a reasonable doubt. *State v. Hogan*, 88 N. W., 1074.

**Burden of proof as to self defense.** The burden is on the state to show that defendant was not acting in self defense, and this it must do by evidence sufficiently strong to remove reasonable doubt. *State v. Shea*, 104-724.

**Defendant's good character.** It is always permissible for the defendant in a criminal action to show his general good character or reputation as to the trait in-

involved in the charge against him. *State v. Heacock*, 106-191.

Proof of good character is admissible, not as showing a defense, but on the ground that one of such character and repute would not be likely to commit the offense charged. *State v. House*, 108-68.

The weight to be attached to proof of good character is for the jury. *Ibid.*

Evidence of good character should be considered together with the other evidence in the case, and it is error to limit the jury with respect to such evidence to determining whether or not the defendant was of good moral character and to direct that a finding of good character may be considered with reference to whether the witnesses who testified to facts tending to criminate defendant were mistaken or testified falsely. *State v. Wolf*, 112-458.

One accused of a criminal offense is permitted to prove his character and general reputation in the community of his residence with respect to the trait involved, but this rule does not permit him to go into details. *State v. Dexter*, 87 N. W., 417.

An instruction as to the effect of impeaching evidence and limiting the effect of proof of general moral character to the credibility of the witness, is not erroneous in failing to fully explain the effect of proof of good moral character with reference to defendant who is also a witness. *State v. Olds*, 106-110.

Instruction as to evidence of good character in a particular case, held, correct. *State v. Cunningham*, 111-233.

**Burden of proof.** As a general rule, when an offense is grounded on a negative, or when that negative is an essential element of the crime, the burden is on the state to prove it. Therefore, held, that in a prosecution for the statutory offense of procuring an abortion the state should satisfy the jury beyond a reasonable doubt that the miscarriage was not necessary to save the life of the woman, the statutory description of the crime containing that exception. *State v. Aiken*, 109-643.

### SEC. 5382. Separation of jury—before final submission.

[For earlier annotations, see code, pages 2060-1.—Ed.]

It is error to allow the jury to separate during the trial where defendant asks in accordance with statutory provisions that

the jury shall be kept together. *State v. Smith*, 102-656.

The authority to permit the jury to separate is granted to the court and not to the judge. *State v. Smith*, 107-480.

### SEC. 5383. Admonition.

[For earlier annotations, see code, page 2061.—Ed.]

Although the jury is to be directed not to form or express an opinion until the case is finally submitted, nevertheless an inadvertent act of a juror, pending the trial,

in telling a person not interested in the case what his conclusion is or will be, does not necessarily require a setting aside of the verdict. *State v. Baughman*, 111-71.

**SEC. 5385. Law and fact.**

[For earlier annotations, see code, page 2061.—Ed.]

The court has no power to instruct that an essential fact has been established, although all the evidence tends to prove such

fact. *State v. Lightfoot*, 107-344. See also notes to next section.

**SEC. 5386. Instructions.**

[For earlier annotations, see code, pages 2061-4.—Ed.]

**Duty as to instructions.** An instruction need not be given on each specific phase of the case, except as requested. *State v. House*, 108-68.

It is not error to fail to call attention to a question arising on the evidence, where no such instruction is asked. *State v. Seevers*, 108-738.

It is not necessary in the instructions to define words in common use, such as the word "felonious." *State v. Penney*, 113-691.

**As to alibi.** It is not error to fail to instruct as to alibi where no such instruction is asked. *State v. Lightfoot*, 107-344.

**Instructions as to facts.** It is error for the court to say that the evidence shows without contradiction that the crime charged has been committed, confining the jury to the determination of the question whether the crime charged was committed by defendant. *Ibid.*

The fact that witnesses testified to material matters, and that there is no direct denial of such facts by other witnesses does not justify the court in instructing that such matters are not in dispute. *State v. Austin*, 109-118.

It is error to tell the jury with reference to a material fact that the proof shows the fact beyond all controversy. The question as to whether a material fact is established by the evidence must be left to the jury, even though there is no conflict in the evidence as to such fact. *State v. Carter*, 112-15.

It is error to instruct the jury that as to essential elements of the crime there is no

conflict in the evidence, and leave the jury to find the defendant guilty without passing on such elements. *State v. Bige*, 112-433.

Where the question was whether defendant was intoxicated at the time of committing the act charged, held, that an instruction to the jury that "there is some evidence tending to show that the defendant" was to some extent under the influence of intoxicating liquor was erroneous in that it tended to indicate to the jury the court's view as to the weight of such evidence. *State v. Dorland*, 103-168.

**On issue not presented.** The jury should not be permitted to convict on an issue of fact not involved in the indictment and an instruction warranting such conviction is erroneous. *State v. Nine*, 105-131.

**Error cured by instructions.** Error of the court in refusing to take from the jury in a prosecution for murder the charge of murder in the first degree, held, to be cured by an instruction that the evidence was not sufficient to support a conviction of murder in that degree. *State v. Phillips*, 89 N. W., 1092.

In general as to instructions, see notes to Code § 3705, in this Supplement.

As to additional instructions after the jury has retired for deliberation, see notes to Code § 5398, in this Supplement.

As to instructions with reference to a lower degree or included offenses, see notes to Code § 5406, in this Supplement.

**SEC. 5389. Want of jurisdiction—no offense charged.**

If evidence is introduced in behalf of the state, and is in dispute, and there is some evidence tending to show venue in the county in which the indictment was found, it is not proper to discharge the jury and order the prisoner committed to

await a warrant from another county, and if defendant is thereafter put on trial in such other county he may plead the dismissal of the prosecution in the first county as a former adjudication. *State v. Spayde*, 110-726.

## CHAPTER 25.

## OF THE JURY AFTER SUBMISSION.

**SECTION 5398. Additional instructions.**

After the jury has been deliberating for some time without arriving at a verdict the court may properly call them in and

instruct with reference to the desirability of a verdict and the necessity of abjuring pride of opinion, and of the proper manner

of procedure in arriving at a verdict when a difference of opinion exists as to the facts. *State v. Tripp*, 113-698.

It is proper to allow the testimony of a witness to be read to the jury in open

court at the request of the jurors. *State v. Hunt*, 112-509.

An additional instruction given to the jury pursuant to its request after retiring for deliberation, held proper. *Ibid.*

## CHAPTER 26.

### OF THE VERDICT.

#### SECTION 5406. Finding an offense of different degree.

[For earlier annotations, see code, pages 2069-70.—Ed.]

Instructions as to lower degrees and included offenses. It is not error to instruct the jury as to the crime charged of which under the evidence the defendant might be convicted, although in fact he is convicted of a lower degree of the crime. *State v. Jackson*, 103-702.

The crime of assault with intent to inflict great bodily injury is not necessarily included in that of rape. *State v. McDonough*, 104-6.

While an assault is necessarily included in rape, yet if it appears from the evidence without question that if there was an assault there was also an assault and battery it will not be error to fail to instruct with reference to assault when a proper instruction as to assault and battery is given. *Ibid.*

It is not error to fail to direct the jury as to conviction for an included crime when the facts show that the defendant is either guilty of the crime charged or not guilty of any crime. Therefore, where defendant was charged with rape in having intercourse with a female under the age of consent, held, that it was not necessary to instruct with reference to a simple assault in view of the fact that if there was any assault it was at least an assault with intent to commit rape. *State v. Sherman*, 106-684.

There may be assault with intent to commit rape without an assault and battery. If the indictment does not charge the assault as accompanied with force it is error to instruct with reference to assault and battery as an included offense. *State v. Desmond*, 109-72.

Where an indictment for rape charges

that defendant wilfully and feloniously assaulted the prosecutrix, and did wilfully and feloniously ravish and carnally know her, it is error to fail to charge the jury with reference to assault and battery, and simple battery. *State v. Wolf*, 112-458.

To require an instruction as to an included offense there must be some evidence which would support a conviction for such offense. *State v. Penney*, 113-691; *State v. Bone*, 114-537.

It is not necessary to instruct as to an included crime for which there could not have been a conviction under the evidence. *State v. Beabout*, 100-155; *State v. Van Tassel*, 103-6.

Where under the evidence defendant is clearly guilty of the offense charged, or not guilty of any offense, it is not error to fail to give instructions with reference to included offenses. *State v. Murphy*, 109-116; *State v. Stanley*, 109-142.

But in a prosecution for murder, where it is a matter of inference only whether the homicide was premeditated and deliberate, or done in a moment of desperation and passion, it is proper to instruct as to murder in the second degree. *State v. Cunningham*, 111-233.

The provision requiring the jury to find as to the degree does not require that in a prosecution for murder in the first degree an instruction be given as to the second degree where the facts show that defendant is either guilty of the crime charged or is innocent of any offense. So held, where the charge was of murder committed by poison. *State v. Smith*, 102-656; *State v. Burloch*, 112-195.

#### SEC. 5407. Included offenses.

[For earlier annotations see code, pages 2070-1.—Ed.]

Where the included offenses are not degrees of the crime charged, but are distinct, failure to give instructions as to included crimes is not necessarily prejudicial error, in the absence of a request for such in-

structions from defendant. *State v. Murphy*, 109-116.

As to instructions with reference to included offenses, see notes to preceding section.

## CHAPTER 27.

## OF EXCEPTIONS.

## SECTION 5415. As to what.

[For earlier annotations, see code, pages 2072-3 —Ed.]

An exception is authorized in a criminal case as to any action or decision of the court which affects a material or substantial right of the party, whether such action or decision was made before or after the trial. Therefore, held, that a statement of the court in its decision overruling a motion for a new trial was properly em-

bodied in the bill of exceptions. *State v. Taylor*, 103-22.

Error in an instruction which has been called to the court's attention by motion for a new trial may be reviewed on appeal, although the instruction was not excepted to. *State v. Hamann*, 109-646.

## SEC. 5418. Taking exceptions.

[For earlier annotations, see code, page 2073.—Ed.]

A bill of exceptions signed by bystanders may be filed within the time allowed by statute or by order of court for filing bill of exceptions. *State v. Taylor*, 103-22.

Misconduct of attorney as a ground for reversal on appeal can not be shown by affidavits, even though they are embodied in the bill of exceptions, but must be made to appear by recitals of the bill of exceptions itself. Although such affidavits may be made part of the record, they do not

become competent evidence to prove the fact. *State v. Burton*, 103-28.

There is no provision for a judge changing a bill of exceptions as offered for his signature to conform to his view of the facts; nor can he, by *addenda* to the bill of exceptions, incorporate other matter into the record. *State v. Smith*, 107-480.

It is not competent to contradict by a bill of exceptions signed by bystanders the recitals of the bill of exceptions as to the same matter signed by the judge. *State v. Tripp*, 113-698.

## CHAPTER 28.

## OF NEW TRIAL.

## SECTION 5424. Causes for.

[For earlier annotations, see code, pages 2074-8.—Ed.]

**As in civil cases.** The rules recognized as to new trials in civil cases are applicable in criminal cases, although on some grounds the courts will set aside verdicts more readily in criminal than in civil cases. *State v. Olds*, 106-110.

**Misconduct of juror.** Where the juror makes false answers as to having previously formed or expressed an opinion, and is shown to have been prejudiced against the defendant, a new trial may properly be granted. *State v. Wright*, 112-436.

**Disqualification of juror.** The objection that one of the jurors could not read or write the English language and that such fact was not known to the party complaining until after the trial will not be a ground for new trial where it appears that the complaining party, having been given the right to challenge, failed to claim such right as to such juror and made no examination of the juror as to his competency. In such case the objection will be deemed to have been waived. (Overruling *State v. Groome*, 10-308); *State v. Pickett*, 103-714.

Where no examination of a juror is made

before he is accepted, and it does not appear that his disqualification was not known to the defendant at that time, the right to object to the juror as disqualified is waived. *State v. Burke*, 107-659.

Where the juror gives false answers as to his having formed or expressed an opinion and is shown to have been prejudiced, the defendant is entitled to a new trial. *State v. Wright*, 112-436.

A showing that one of the jurors who has testified that he had not heard of the case nor formed or expressed an opinion with reference thereto, had in fact been present when the statements were made as to the commission of the crime, held, not sufficient to entitle the defendant to a new trial. *State v. Geier*, 112-706.

**Misconduct of counsel.** Where defendant make no complaint at the time as to improper remarks of counsel, and asks no direction to the jury for the purpose of removing prejudice arising therefrom, he cannot afterwards complain. *State v. Hogan*, 88 N. W., 1074.

**Witness not sworn.** Where one of the material witnesses for the prosecution was not sworn, and the fact was not discovered until after the verdict, held that the defendant was entitled to a new trial. *State v. Lugar*, 88 N. W., 333.

**Verdict against evidence.** The rule with reference to granting new trials for want of evidence in criminal cases is different from that applied in civil. The supreme court, though proceeding carefully and cautiously, will not support a verdict if it be against the clear weight of the evidence. *State v. Reinheimer*, 109-624.

**Absence of the judge from the court room,** held, not to be ground of new trial where it appeared that the absence was during the argument of counsel and that the judge was not out of hearing of counsel at the time, and heard all that was said. *State v. Porter*, 105-677.

The fact that the judge is during the argument out of hearing and is not presid-

ing over the proceedings will be a ground for reversal. *State v. Carnagy*, 106-483.

While absence of the judge from the court room during the trial may be ground of reversal, yet, where the defendant has consented thereto, he cannot afterwards complain if he might have secured the presence of the judge at any time, and shows no prejudice resulting to him from his absence. *State v. Hammer*, 89 N. W., 1083.

**Newly discovered evidence** is not a statutory ground for a new trial in a criminal case. *State v. Watson*, 102-651.

Newly discovered evidence is not in itself sufficient to warrant a new trial. *State v. Reinheimer*, 109-624.

Affidavits of newly discovered evidence do not necessarily entitle the defendant to a new trial. *State v. Baughman*, 111-71.

In a particular case, held, that the court did not abuse its discretion in refusing to grant a new trial on the ground of newly discovered evidence. *State v. Seevers*, 108-738.

## CHAPTER 30.

### OF JUDGMENT.

#### SECTION 5442. Allowance of bail upon appeal.

[For earlier annotations, see code, page 2083 —Ed.]

[The provisions of this section are inconsistent with the last sentence of Code §5096 ]

## CHAPTER 31.

### OF EXECUTION.

#### SECTION 5443. Copy of judgment.

The court has no power to suspend sentence after it is announced. *Miller v. Evans*, 88 N. W., 198.

Therefore, a defendant who after sentence of imprisonment has been allowed by the officer to remain at large until the ex-

piration of the term of imprisonment fixed by the sentence can still be committed to serve out the term. The time at which the sentence is to be carried out is ordinarily directory only, and forms no part of the judgment of the court. *Ibid.*

## CHAPTER 32.

### OF APPEALS.

#### SECTION 5448. When allowed.

[For earlier annotations, see code, pages 2084-5.—Ed.]

From final judgment. Where the record showed that the court sustained a motion in arrest of judgment and ordered defendant to appear before the next grand jury, held, that such ruling was a final judgment from which an appeal might be taken by

the prosecution. *State v. Alverson*, 105-152.

There cannot be an appeal in a criminal case from an order overruling a demurrer. *State v. Doty*, 109-453.

The action of the trial court in sustaining a demurrer to the indictment and re-submitting the case to the grand jury does not constitute a final judgment from which the state may appeal. *State v. Evans*, 111-80.

This section provides only for appeals in criminal cases from the final judgment, and not from an intermediate order. *State v. Wright*, 111-621.

**Effect of appeal.** Until the judgment of the lower court is modified or reversed it continues in force notwithstanding an appeal, although the right to execute it may be suspended; therefore the record of con-

viction for a felony may be introduced to impeach the credibility of a witness although an appeal from the judgment in such case is pending. *Hackett v. Freeman*, 103-296.

**Appeal by state.** It is not contemplated that on an appeal by the state the supreme court shall deal with imaginary questions. *State v. Gunn*, 106-120.

The fact that on an appeal by the state the court finds the ruling of the district court on a demurrer and its judgment thereon to be erroneous will not affect the right of defendant to insist that as to him the judgment was final. *State v. Fields*, 106-406.

### SEC. 5450. Transcript—duty of clerk.

[For earlier annotations, see code, page 2085.—Ed.]

While a judge may have some discretion under Code § 254 as to ordering a transcript at the expense of the county when defendant is unable to pay for it, yet, if he finds that fact he should not refuse to order the transcript merely because in his judgment the defendant has had a fair trial. *State v. Robbins*, 106-688.

Under the provisions of Code § 254, that a transcript of the evidence may be ordered at the expense of the county where it is shown by defendant that he is unable to pay for such transcript, for the purpose of appeal, the application for such transcript should be made to the trial judge. *State v. Cater*, 109-69.

### SEC. 5462. Decision—costs on reversal.

[For earlier annotations, see code, pages 2087-91.—Ed.]

**Objections not made below.** The rule which obtains in civil cases that an objection not made in the court below cannot be considered in the supreme court on appeal does not apply in criminal cases where the statute requires that the supreme court shall examine the record and without regard to technical errors or defects which do not affect the substantial rights of the parties render such judgment on the record as the law demands. *State v. Nine*, 105-131.

**Exceptions necessary.** Defendant in a criminal case may waive error on appeal, and he does so by not taking exception in the lower court to the ruling of which he subsequently complains. And if the defendant files an argument on appeal the court will consider only the errors urged in such argument. *State v. Schwab*, 112-666.

Where proper exceptions are not taken, rulings on questions of law raised during the trial will not be considered on appeal. *State v. Williams*, 88 N. W., 194.

**Verdict against evidence.** The supreme court, though proceeding carefully and cautiously, will interfere in criminal cases more readily than in civil on the ground that a verdict is without support in the evidence. *State v. Burtoch*, 112-195.

In a particular case, held that there was not sufficient evidence to warrant a con-

viction for murder by the administration of poison. *Ibid.*

**Error without prejudice.** Action of the court which is absolutely harmless and without prejudice will not be a ground of reversal, whether erroneous or not. *State v. Novak*, 109-717.

In appeals in criminal cases the supreme court considers the case without regard to technical errors or defects which do not affect substantial rights of parties. *State v. Robbins*, 106-688.

A conviction will not be reversed for a refusal to allow a witness to answer a question asked where it appears that the response to the question desired would have been favorable to the party objecting. *State v. Kuhn*, 90 N. W., 733.

**Costs.** The provision that in case of reversal or modification in defendant's favor of a judgment on appeal he shall be entitled to recover the costs of printing abstracts and briefs, to be paid by the county from which the appeal is taken, applies to suits pending at its passage. *State v. Dorland*, 106-40.

The recovery against the county in such case is to be by way of taxation of costs. If the costs thus taxed are not paid by the county they may undoubtedly be recovered by suit against it. *Ibid.*

### SEC. 5468. Time of imprisonment deducted.

[For earlier annotations, see code, page 2092.—Ed.]

The deduction of the time of imprisonment which defendant has served under a

sentence which has subsequently been reversed is to be fixed by the court, and the

period of imprisonment specified in the second judgment is to be what remains after deduction is made from that which the court finds to be the proper term of imprisonment on the second conviction. It

will be presumed, therefore, that the term fixed by the court on the second conviction has been determined in view of the amount of deduction to which the prisoner is entitled. *Travis v. Hunter*, 109-602.

## CHAPTER 34.

### OF EVIDENCE AND WITNESSES.

#### SECTION 5483. As in civil cases.

[For earlier annotations, see code, pages 2094-2100.—Ed.]

**Declarations or admissions of defendant.** Acts, conduct, threats, declarations and statements of a person accused of crime occurring before it was committed are admissible to show a motive or intent and may be established not only by direct but also by circumstantial evidence. *State v. Smith*, 102-656.

Threats made by the accused against the person or property of the injured party may be shown to prove the existence of malice to connect the accused with the commission of the crime. *State v. Millmeier*, 102-692.

Statements by defendant made after the crime in question was committed, held, not to be shown to have relation to the crime and therefore to have been erroneously admitted. *Ibid.*

As a general rule, verbal admissions of a party should be received with great caution as that kind of evidence is subject to imperfections and mistake, but held that it was not necessary to instruct the jury to this effect where the admission relied on appeared to have been made deliberately and understandingly in a conversation in which his purpose was to state the particular facts of his connection with the crime. *State v. Jackson*, 103-702.

As to confessions, see notes to Code § 5491 in this Supplement.

**Declarations of co-conspirators.** Where the acts of co-conspirators may be shown as against defendant their declarations in explanation of their conduct are also admissible. *State v. Healey*, 105-162.

**Statements in hearing of defendant.** Declarations of one who has been recently poisoned made *in extremis* in the presence of one whom he charges with the administration of the poison, held, to be admissible as against the person so charged. *State v. Kuhn*, 90 N. W., 733.

**Dying declarations.** Declarations made under a solemn sense of approaching death are only competent as to facts which the witness might testify to if living. Therefore, expressions of opinion on the part of deceased are not admissible as dying declarations. *State v. Wright*, 112-436.

Dying declarations must be shown to have been made under a sense of impending

death, but this apprehension of certain dissolution may be inferred from the conduct, condition or statements of the declarant. The question as to whether such statements are admissible as dying declarations is for the court. *State v. Kuhn*, 90 N. W., 733.

The statement in such a declaration with reference to the defendant that "she poisoned me" is not inadmissible on the ground that it states a conclusion. *Ibid.*

**Attempt to escape.** Evidence of attempted escape is admissible as tending to show guilt. In response the defendant may show, if he can, that the attempt to escape was because of fear of mob violence. *State v. Desmond*, 109-72.

**Evidence of distinct crime.** In a prosecution for maliciously exposing a poisonous substance with intent that it be taken by a domestic animal, evidence of such acts with reference to other animals is admissible to show intent. *State v. Lightfoot*, 107-344.

If evidence is material and relevant to the issue, the mere fact that it tends to establish guilt of a crime other than the one alleged furnishes no ground for its rejection. *State v. Wrand*, 108-73.

In a prosecution for assault with intent to commit rape by having connection with a girl under the age of consent, held, that improper conduct of defendant with other girls in the same transaction might be proved. *State v. Desmond*, 109-72.

In a prosecution for obtaining property by false pretenses, evidence of similar pretenses made about the same time and in the same neighborhood to other persons may be shown, if accompanied with evidence that such pretenses were false. *State v. Carter*, 112-15.

In a prosecution for forgery, evidence of other similar forgeries may be introduced to show the intent. *State v. Prins*, 113-72.

**Against one of joint defendants.** Where two or more defendants are joined together, evidence admissible against one of them may be introduced although it is inadmissible against the others, the jury being directed to consider such evidence only as against the defendant as to whom it is admissible. *State v. Wolf*, 112-458.

**SEC. 5484. Who competent—defendant as witness.**

[For earlier annotations, see code pages 2101-2.—Ed.]

Where defendant testified as a witness in his own behalf and was the only witness interested in the result of the case who did testify, held, that it was not error to call the attention of the jury to the fact that the defendant was so interested and that such interest might be taken into account in weighing his testimony. *State v. Young*, 104-730.

It is not error for the court to direct the attention of the jury to the fact that the defendant, who has testified, is an interested party as bearing on the weight to be given to his testimony. *State v. Ryan*, 113-536.

The fact that defendant was the wife of deceased does not change the rule that the credibility of her testimony is for the jury, and it is proper to instruct the jury that they may consider her interest, even

though the existence of the marital relation might be regarded as strengthening the presumption of innocence. *State v. Hossack*, 39 N. W., 1077.

The court should on the request of defendant give an instruction in accordance with the provisions of this section, even though no reference has been made to the failure of defendant to be a witness. *State v. Carnagy*, 106-483.

Remarks of counsel in a particular case held not objectionable as referring to failure of defendant to testify. *State v. Davis*, 110-746.

Where one of two defendants is separately tried the provisions of this section are not applicable as to failure to testify on the part of defendant not on trial. *State v. Hogan*, 88 N. W., 1074.

**SEC. 5485. Cross-examination of defendant.**

[For earlier annotations, see code, page 2102.—Ed.]

The defendant who has testified as a witness may be cross-examined with reference to his various places of residence, his going under assumed names, and his whereabouts at particular times. *State v. Watson*, 102-651.

Where defendant in a criminal case is a witness, he may be cross-examined as to his

different occupations and places of residence. *State v. Chingren*, 105-169.

A defendant who becomes a witness may be cross-examined with reference to his memory, history, motives or matters affecting his credibility. *State v. Kuhn*, 90 N. W., 733.

**SEC. 5488. Corroboration in rape, seduction, etc.**

[For earlier annotations, see code, pages 2102-4.—Ed.]

**In prosecutions for rape.** The statute does not fix the amount or kind of evidence required in corroboration, nor is its sufficiency to be determined by excluding the evidence of the injured party. If considered in connection therewith the other evidence tends to identify and single out the accused as the perpetrator of the crime. It is of that character contemplated by the statute and its sufficiency is to be passed upon by the jury. *State v. Baker*, 106-99.

Where there was evidence of circumstances tending to identify and point out the defendant as the perpetrator of the crime, held, that it constituted sufficient corroboration to go to the jury. *Ibid.*

Corroboration is one of the essentials of conviction without which the accused is entitled to an acquittal and it is the duty of the court to so instruct the jury although no such instruction is asked. *State v. Carnagy*, 106-483.

An instruction that there must be evidence corroborating the testimony of the prosecuting witness, without specifically stating that the corroboration must tend to connect the defendant with the commission of the offense, is erroneous. *State v. Fountain*, 110-15.

Evidence in a prosecution for rape that the prosecuting witness, in making complaint soon after the offense, named the defendant as the guilty party does not constitute such corroboration of her own testimony charging him with the crime as is required under this section. Evidence of complaint made by the prosecuting witness soon after the commission of the offense is corroborative only of her evidence that the crime was committed. *State v. Wheeler*, 89 N. W., 978.

In prosecutions for seduction, proof of acquaintance and of opportunity is not alone sufficient corroboration of the prosecuting witness, but the fact that accused was waiting on prosecutrix as a suitor, shown by his being with her attending church or entertainments, taking long drives, etc., may be sufficient. Proof of admissions on the part of accused that he was waiting on prosecutrix only ostensibly as a suitor, may furnish the necessary corroboration. *State v. Hughes*, 106-125.

Proof of a statement by defendant made within a week after the alleged seduction that he was going to the house of prosecutrix for sexual intercourse, held, properly

admissible as tending to show that such relation had existed between them. *Ibid.*

The fact that the parties kept company and acted as lovers usually do, and other like circumstances, are sufficient to constitute the corroborating evidence necessary to connect the defendant with the offense. *State v. Reinheimer*, 109-624.

Proof that defendant visited prosecutrix as a suitor is not sufficient, as a matter of law, to constitute the required corroboration. *State v. Bess*, 109-675.

Evidence of conduct of defendant towards prosecutrix as a lover prior to and about the time of the alleged seduction, held sufficient corroborative evidence. *State v. Mulholland*, 88 N. W., 325.

Corroboration may be found, not alone in any one particular fact, but in the relation of the parties and the attending circumstances. *State v. Hayes*, 105-82.

A writing by defendant tending to connect him with sexual intercourse had with the prosecuting witness on one date, held, not to be a corroboration of the evidence of

prosecutrix with reference to a connection had at previous date. *State v. Burns*, 110-745.

The corroboration must be by evidence other than that of the prosecutrix, and must tend to connect the defendant with the crime. Proof that prosecutrix gave birth to an illegitimate child is, therefore, not a corroborative circumstance. *State v. McGinn*, 109-641; *State v. Coffman*, 112-8; *State v. Kissock*, 112-690.

Mere proof of acquaintance and opportunity does not constitute the corroboration required in cases of seduction. *State v. Kissock*, 112-690.

The crime being established, evidence of intimacy and actual cohabitation is sufficient as connecting defendant with the crime. *State v. Wycoff*, 113-670.

Incest. Corroboration is not required in a prosecution for incest. *State v. Kouhns*, 103-720.

[As to corroboration in prosecution for compelling to marry or defilement, see Code § 4757.]

#### SEC. 5489. Corroboration of accomplice.

[For earlier annotations, see code, pages 2104-5.—Ed ]

The woman with whom the unlawful act in seduction or incest is committed is not an accomplice in such sense as to require corroboration. *State v. Kouhns*, 103-720.

To make corroboration of the evidence of an accomplice necessary as provided by statute it is only required that it appear that the witness was an accomplice by a preponderance of the evidence. *State v. Smith*, 102-656.

The corroboration is not sufficient in such a case if it merely shows the commission of the offense or the circumstances thereof. *Ibid.*

Instructions in a particular case as to corroboration required to support the testimony of an accomplice, held correct. *State v. Smith*, 106-701.

#### SEC. 5491. Confession of defendant.

[For earlier annotations, see code, page 2106.—Ed.]

Where a confession is proven by the evidence of a detective it is proper to show to the jury what arts were used by the detective to secure such confession and all the circumstances under which the confession was made. *State v. Van Tassel*, 103-6.

A mere admission or declaration of a defendant against his interest is not necessarily a confession, even though the admission is criminating. To make an admission or declaration a confession it must in some way be an acknowledgment of guilt, and be so intended. *State v. Novak*, 109-717.

The violation by a detective to whom admissions are made of an agreement not to reveal such admissions will not render the

Where defendant introduces a witness who testifies to being an accomplice with another in the commission of the crime charged, defendant cannot complain that instructions were not given as to the necessity of corroboration. *Ibid.*

Section applied, in a prosecution for keeping a house of ill fame with reference to the evidence of an inmate. Whether in such cases such a witness is to be deemed an accomplice within the meaning of the statute *quaere*. *State v. Chauvet*, 112-687.

An accessory after the fact, as, for instance, a receiver of stolen goods, is not an accomplice under the provisions of this section. *State v. Jones*, 98 N. W., 196.

admissions incompetent if they were voluntary when made. *Ibid.*

Evidence in a particular case held not to show any such promises, threats or duress such as to render admissions incompetent. *Ibid.*

The prosecution, in putting in evidence statements of the defendant as constituting admissions, does not bind itself to accept as true all that may be contained in the statements shown. *Ibid.*

The fact that defendant at the time of making the confession was in the custody of one of the parties does not in itself show the statements to have been involuntary. *State v. Peterson*, 110-647.

Where the confession appears on its face to be free and voluntary, the burden is on defendant to rebut that presumption. *State v. Storms*, 113-385.

It is for the court to determine whether the confession was voluntary. But if there is a conflict of the evidence on that question, and the court is in doubt, the question should be left to the jury. *Ibid.*

Evidence in a particular case held not sufficient to show that the confession was not voluntary. *Ibid.*

The fact that after defendant was placed

under arrest the officer in charge questioned him, and that in response to such questions he made a confession, is not sufficient to render it invalid. *State v. Penney*, 113-691.

Where the person having custody of the defendant assures him that it will go easier with him if he tells the facts tending to show him guilty of the offense, a statement of the defendant made in response to such suggestion is not voluntary, and should not be received. *State v. Jay*, 89 N. W., 1070.

**SEC. 5499-a. Photograph—measurements.** It shall be lawful for the sheriff of any county or the chief of police in any city in this state, to take or procure the taking of the photograph of any person held to answer on a charge of any felony, such person being in the custody of such officer, or to make and record any measurements of such prisoner, by the Bertillion or other system, and to exchange such photographs, or measurements, or copies of the same, with other sheriffs and police officers, or to distribute the same by mail for the purpose of securing evidence for the identification of such person held to answer, if the identity and past record of the said person are unknown to him, and the cost of such photographs, and measurements, and of distributing the same, may be allowed by the court as a part of the costs in the case. [29 G. A., ch. 154, § 1.]

## CHAPTER 35.

### OF BAIL.

#### SECTION 5505. Form of bond.

[For earlier annotations, see code, page 2110—Ed.]

The surety does not become bound to pay the fine imposed upon the principal. He is simply a jailor for the principal, charged with the duty of producing him when his personal presence is required, or to surrender him in execution of judgment. When once that duty is performed the liability of surety is extinguished, and

whenever the court orders the defendant out on bail into the custody of the sheriff, in execution of the judgment pronounced against him, and the sheriff in pursuance of that order takes possession of the prisoner, the liability of the surety ceases. *State v. Zimmerman*, 112-5.

## CHAPTER 39.

### OF DEPOSIT OF MONEY INSTEAD OF BAIL.

#### SECTION 5524. With whom and effect.

[For earlier annotations, see code, pages 2115.—Ed.]

There is no provision for the deposit of money by any person other than the defendant himself, and when a deposit of money is made there is no right to have it returned except to the defendant. One who furnishes money to secure the release of

a defendant on bail must be presumed to have loaned it to the defendant, and he is not entitled to have it returned to him individually. Such money may, therefore, be applied to the payment of the fine imposed on the defendant. *State v. Owens*, 112-403.

## CHAPTER 40.

## OF SURRENDER OF THE DEFENDANT.

**SECTION 5528. Method.**

[For earlier annotations, see code, page 2116.—Ed.]

Where a defendant who was on bail to depart for temporary purpose, held, placed himself under the control of the sheriff after conviction, and was subsequently allowed, by an order of the court, that his surety was thereby released. *State v. Zimmerman*, 112-5.

**SEC. 5530. Return of money deposited.**

As a third person is not authorized to deposit money to secure the release of defendant on bail, one who has thus furnished money to secure defendant's release is not entitled to have it returned to him on surrender of defendant. *State v. Owens*, 112-403.

## CHAPTER 43.

## OF THE DISMISSAL OF CRIMINAL ACTIONS.

**SECTION 5536. If not tried at second term.**

[For earlier annotations, see code, page 2118.—Ed.]

This section relating to the dismissal of a prosecution where defendant is not brought to trial at the fixed regular term of the court in which the indictment is triable was evidently designed to enforce the constitutional provision giving the defendant in a criminal prosecution the right of a speedy trial. If postponement of the trial is due to any request or conduct on the part of the defendant or his counsel, or if the case is continued without objection on defendant's part without demand for a trial, he is not entitled to a dismissal because the case was not brought to trial at the second term. *State v. Smith*, 106-701.

## CHAPTER 44.

## OF THE INSANITY OF A DEFENDANT.

**SECTION 5540. Proceedings suspended.**

[For earlier annotations, see code, page 2119.—Ed.]

After a defendant has been arrested on a warrant issued on an indictment the district court has exclusive jurisdiction to determine the question of his sanity and his custody in case of insanity, and the commissioners of insanity cannot be given authority to investigate such question. The provisions of Code § 2279, so far as they purport to give such authority to the commissioners, are invalid. The court should proceed in such case under this section. *Stone v. Conrad*, 105-21.

## CHAPTER 47.

## OF PROCEEDINGS AND TRIALS BEFORE JUSTICES OF THE PEACE.

**SECTION 5577. Information—what to contain.**

[For earlier annotations, see code, pages 2124-5.—Ed.]

An amendment to an information in a prosecution before a justice of the peace may be made in the district court on appeal. *State v. Reilly*, 108-735.

## CHAPTER 49.

## OF PARDONS AND THE REMISSION OF FINES AND FORFEITURES.

## SECTION 5626. By governor.

[For earlier annotations, see code, pages 2132-3.—Ed.]

The governor has the power to remit a fine imposed in a criminal prosecution for maintaining a liquor nuisance but cannot remit the costs nor prevent their being a lien upon the property against which they are adjudged. *State v. Mateer*, 105-66. The governor may grant a conditional suspension of judgment in a criminal case. *Ibid.*

## CHAPTER 50.

## OF ILLEGITIMATE CHILDREN.

## SECTION 5629. Complaint.

[For earlier annotations, see code, pages 2133-5.—Ed.]

Evidence of improper relations between the prosecutrix and a man not the defendant is immaterial, unless it be shown that such relations might have existed at the time the child in dispute was conceived. *State v. SeEVERS*, 108-738.

If the defendant is the father of the child, he is liable in this proceeding, even though the mother was the lawful wife of another at the time the child was conceived, and he knew the fact. *Ibid.*

It is not proper to permit prosecutrix to testify that she is without money or

other property with which to support the child. *Ibid.*

In a bastardy proceeding it is error to allow an infant nine months of age, claimed to be the result of intercourse between defendant and the complaining witness, to be introduced in evidence to the jury. *State v. Harvey*, 112-416.

Under complaint filed before the child is born proof of the subsequent birth of the child is competent evidence. It is not required in such case that after the birth of the child the complaint be amended by alleging that fact. *State v. Harris*, 112-589.

## TITLE XXVI.

### OF THE DISCIPLINE AND GOVERNMENT OF JAILS AND PENITENTIARIES

#### CHAPTER 1.

##### OF THE JAILS.

#### SECTION 5652. Hard labor may be required.

[For earlier annotations, see code page 2138 —Ed.]

The length of time that prisoners shall be required to labor depends upon the character of the work, the season of the year, their strength and condition of health, whether accustomed to labor, and must necessarily be left largely to the discretion of the officer in charge of the prisoners. *State v. Welsh*, 109-19.

#### CHAPTER 2.

##### OF PENITENTIARIES.

[Section 2727-a8, *supra*, places the management, control and government of the state penitentiaries under the board of control —Ed.]

**SECTION 5662. Bond—oath.** Each shall, before entering upon the discharge of his duty, execute a bond payable to the state in the penal sum of twenty-five thousand dollars, with not less than five freehold sureties, to be approved by the governor, conditioned that he will faithfully discharge all his duties as general superintendent and financial agent of the state for said institution; that he will faithfully apply any and all moneys that may come into his hands by virtue of his office to the purposes for which they are appropriated, and none other; that he will cause to be kept a full and intelligible record of all the transactions of a monetary character connected with the institution; that he will impartially, and to the best of his ability, administer the disciplinary regulations of the institution so as to contribute to the health, safe keeping and profitable employment of the convicts; that he will appoint no one to the office of clerk, deputy warden or guard through favoritism or other personal consideration, and no one without due and proper regard to his qualifications for said stations; that he will render a faithful account of all the transactions of the institution to the governor, or his lawfully authorized agent, every thirty days, and oftener, as he may be required; that he will not become directly or indirectly interested in any contract for supplying materials, labor, provisions, clothing or any other thing for the use of said penitentiary, and that, at the expiration of his official term, he will surrender all books, papers, records, moneys or other property or securities belonging to said institution to his successor in office. Each shall also take and subscribe an oath or affirmation, which shall be indorsed on the back of said bond, that he will support the constitution of the United States and that of the state of Iowa, and that he will scrupulously observe all the stipulations and conditions of said bond, and faithfully discharge all his duties agreeably to law according to the best of his ability, which bond shall be filed with the secretary of state. [C. '73, § 4747; R., § 5175.] [28 G. A., ch. 136, § 1.]

**SEC. 5663. Restrictions—clerk—guards—assignment of duties.** The warden must not carry on nor be concerned in the business of trade or

commerce during his continuance in office; he must reside constantly within the precincts of the prison, and shall take charge of the penitentiary and of all the interests of the state connected therewith, and shall appoint some suitable person as clerk, who shall also act as commissary under the direction of the warden, and one deputy, and as many guards as may be necessary to the safe keeping and government of the convicts, not exceeding one for every ten convicts under his charge at Fort Madison, and one for every eight at Anamosa, and the warden under the direction of the board of control shall assign said guards to any duty that may be necessary to properly conduct the business of said penitentiaries. At no time shall there be less than thirteen guards at Fort Madison. [17 G. A., ch. 149; C. '73, § 4748; R., § 5142; C. '51, § 3128.] [27 G. A., ch. 117, § 1.]

**SEC. 5667. Clerk—bond—oath.** Each clerk of the penitentiary shall receive his appointment from and hold his office during the pleasure of the warden, and be in all things responsible to him. Before entering upon the discharge of his duties, he shall give bond to the state in the penal sum of twenty thousand dollars, with two or more freehold sureties, to be approved by the governor, conditioned that he will keep a fair, honest, impartial and faithful record of the affairs of the penitentiary, written in a legible hand, with proper indices, upon a system of bookkeeping which shall enable him at all times to present in a plain and intelligible manner the financial condition of the institution; that he will discharge all his duties as clerk and commissary faithfully; and that he will not become interested, directly or indirectly, in any contract for furnishing supplies for the use of said institution: and that he will yield strict and implicit obedience to the laws, rules and regulations of the institution, and to all the legal orders of the warden. He shall also take and subscribe an oath, which shall be indorsed on the bond, that he will support the constitution of the United States and that of this state, and that he will scrupulously observe all the conditions, stipulations and requirements thereof, and will faithfully discharge his duty as clerk and commissary during his continuance in office, according to the best of his judgment and ability; which bond shall be filed in the office of the secretary of state, and action thereon may be brought for the violation of any of its conditions, in the name of the state, for the use of the warden or any other person injured by such violation. [26 G. A., ch. 79, § 1; C. '73, § 4752; R., § 5180.] [28 G. A., ch. 136, § 2.]

**SEC. 5669-a. Residence for deputy—house rent.** From and after the completion of the warden's house at the penitentiary at Anamosa, the deputy warden shall be entitled to occupy the building now used as the warden's residence, which shall be furnished with heat and lights. Until the new residence for the warden is completed the deputy warden is hereby allowed the sum of ten dollars, (\$10.00) per month as house rent. [27 G. A., ch. 116, § 1.]

**SEC. 5683. Property of convict.**

Under authority to receive and care for any property the convict may have on his person on entering, the warden may take possession of a certificate of deposit, but has no right to receive payment of the

amount called for, and if he does so the convict may afterwards recover against the bank the amount of the certificate. *Thompson v. Niles*, 87 N. W., 732.

**SEC. 5685. Visitors.** The warden shall demand and receive of each person, except those exempt by law and relatives of a convict confined therein, who visits the prison for the purpose of viewing the interior or precincts, a sum of twenty-five cents, of which the warden shall keep an account, of which seventy-five per cent. shall be applied for the purchase of books and periodicals for the use of the prison, and twenty-five per cent. be expended for lectures, concerts, or entertainments for the prisoners, under the direction

of the wardens and board of control. [C. '73, § 4780; R., § 5164; C. '51, § 3151.] [28 G. A., ch. 137, § 1.]

**SEC. 5685-a. Same.** Ten per cent. of the amount derived from same source, on hand at the time of the passage of this act, is hereby appropriated for like purposes, under the same restrictions. [28 G. A., ch. 137, § 2.]

**SEC. 5702-a. Manufacture prohibited.** It shall not be lawful except to complete existing contracts made by board of control to manufacture for sale any pearl buttons or butter tubs in the penitentiaries of the state, and it shall be the duty of the board of control and wardens of said penitentiaries to enforce the provisions of this act, and to prohibit the manufacture of pearl buttons or butter tubs, in whole or in part, by the inmates confined in said penitentiaries. [28 G. A., ch. 138, § 1.]

**SEC. 5702-b. Existing contracts.** This act shall not alter or impair the conditions of any contract actually made and entered into by and between any contractor and the board of control, which shall have been made prior to the passage of this act. [28 G. A., ch. 138, § 2.]

**SEC. 5707. Work in stone quarries.** Able-bodied male persons sentenced to imprisonment in the penitentiary may be taken to that at Anamosa, or to that at Ft. Madison, there confined and worked in places and buildings owned or leased by the state outside of the penitentiary enclosures; but the labor of such convicts shall not be leased, and the warden shall keep a regular time-table of the convict labor and record thereof in a book provided for that purpose, and shall also keep a record of all the business under his control, returning to the clerk at the close of each day an account thereof, together with that of convict labor. He shall also have all stone which is not used for building purposes by the state, together with all refuse stone at the quarries, broken with hammers into pieces of not more than two and one-half inches in diameter, to be used for the improvement and macadamizing of streets and highways, this work to be done by convict labor when not otherwise employed, but the warden may in his discretion make such disposition of any surplus refuse stone at the quarries as may be for the best interest of the state. [25 G. A., ch. 20, § 1; 18 G. A., ch. 154, § 3; 17 G. A., ch. 187; 16 G. A., ch. 40, §§ 7, 8; 14 G. A., ch. 43, § 14.] [29 G. A., ch. 155, § 1.]

**SEC. 5716. Compensation of officers and employes.** The officers and employes of each penitentiary shall be paid for their services the following sums, monthly: the warden, one hundred and sixty-six dollars and sixty-seven cents; the deputy warden, one hundred dollars; the clerk, one hundred dollars; the chaplain seventy dollars; each turnkey and guard, fifty dollars; the physician at Fort Madison seventy-five dollars; the physician at Anamosa, for his entire services in the penitentiary and the department for the criminal insane, one hundred dollars; the assistant deputy warden in charge of the criminal insane department, eighty-three dollars and thirty-four cents; the matron, seventy-five dollars; which amounts shall be paid by the state treasurer upon the requisition of the warden, accompanied with a detailed itemized statement duly verified, showing the number and kind of guards employed, the separate, several payments of the money drawn the previous month, and such other matters, if any, as the state auditor may require. [26 G. A., ch. 79, § 2; 22 G. A., ch. 69, §§ 7, 10; 20 G. A., ch. 187, § 2; 18 G. A., ch. 200; 17 G. A., ch. 167; 16 G. A., ch. 156; C. '73, §§ 4783-4; R., § 5192.] [29 G. A., ch. 156, § 1.]

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# RULES OF THE SUPREME COURT

FOR

ADMISSIONS TO THE BAR.

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ADOPTED AT THE MAY TERM, 1901.

**Ordered:** That the following rules for the examination of applicants for admission to practice as attorneys and counselors in the courts of this state, in accordance with the provisions of title III, chapter 10, of the code of Iowa, as amended by chapter 11 of the acts of the twenty-eighth general assembly, shall be in force from and after said May term.

SEC. 108-a. The board of law examiners shall consist of five members, in addition to the attorney-general; and no examination for admission shall be conducted by less than three members of the board. [Rule 1.]

SEC. 108-b. Examinations shall be held at the capitol, at Des Moines, commencing on the first Tuesday in October and the second Tuesday in May, and at Iowa City on the Wednesday preceding the first Thursday in June of each year, and each examination shall continue not less than three days. Such examinations shall be both written and oral. At least fifty written questions to be prepared by such board on subjects of the law shall be propounded to each candidate, to be answered in writing, and the members of the board shall conduct such oral examinations as they deem necessary and proper. The board shall estimate each candidate's examination in percentage on the basis of one hundred per cent. for the entire examination, and no one shall be recommended by the board for admission who does not, on this basis, receive a marking of at least seventy-five per cent. [Rule 2.]

SEC. 108-c. The board shall determine the general educational qualifications of the applicants for examination before allowing them to enter upon the examination as to their legal attainments, and for this purpose they shall require applicants to pass a satisfactory written examination in orthography, reading, writing, arithmetic, geography, English grammar, United States and English history, elementary algebra, Elementary physics, elementary economics and civil government, and on such other subjects as the board may deem necessary to determine whether the applicants have the general educational qualifications required by statute for admission. But the board may accept, in lieu of such examination, proof that the applicant is a graduate of a collegiate course in any university or college of good standing in the United States, or is a graduate from a three-year course in any high school having a course of study which prepares for admission to the State University, or in any normal school or academy prescribing a course of study at least equivalent to such a high school course. The board may adopt regulations as to accepting proofs of general educational qualifications. Until the board shall adopt further regulations on the subject, diplomas from any university or college showing the holders to have received the degree of bachelor in any classical, philosophical, scientific or engineering course, certificates or diplomas showing the completion of a three-year course of study in any high school recognized by the state university, and certificates or diplomas of the state board of educational examiners, shall be deemed sufficient. The board may, before recommending for admission, subject to a special examination

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as to general educational requirements any applicant who has been admitted to take the legal examination on proof of such educational qualifications without examination by the board, whose written or oral examination on legal subjects renders it doubtful whether his educational qualifications are such as are required by statute. [Rule 3.]

SEC. 108-d. No candidate who has failed to pass any examination given by the board shall be received as an applicant for examination within three months after such failure. [Rule 4.]

SEC. 108-e. The board of law examiners shall prepare such forms as may be necessary for applications for examination, and make such rules, not inconsistent with the rules of this court, with reference to the method of making application for examination and the method of conducting the examinations herein provided for, as they may deem expedient. [Rule 5.]

SEC. 108-f. The members of the board of law examiners shall be paid fifteen dollars each for each day spent in conducting examinations as authorized by these rules, upon the certificate of the attorney-general as to the time thus occupied; such compensation to be paid by the clerk of this court out of funds in his hands derived from fees of candidates for examination. [Rule 6.]



# INDEX.

This index covers the Constitution of Iowa, the Code, the Supplement to the Code, and the Rules of the Supreme Court. The other articles in the "Prefix" are referred to only in a general way.

The references are to both sections and pages—the page number following the section number, after a colon.

The black letter "S" indicates that the section and page numbers following it will be found in the Supplement to the Code, while those not preceded by said letter, will be found in the Code.

The letter "R" before a section number indicates that the section is found in the Rules of the Supreme Court.

The expression "*et seq.*," following a section number, means "and sections following."

All sections of the Code, that have been amended, and are still in force, will be found complete in the Supplement, as amended, having the same section number, while repealing sections, and new matter will be found in the Supplement, under sub-section numbers, as Section 4-a, etc.

## A

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## N

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 See HUSBAND AND WIFE.
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 See HUSBAND AND WIFE.
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 Accused entitled to be confronted by those against him, and to have process for, Const., art. 1, § 10: 67.  
 Before committees of General Assembly, attendance and compensation of, §§ 21, 22: 116.  
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   Fees of, § 530: 257.  
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 Before railroad commissioners, not excused because testimony may tend to criminate, § 2131: 757.  
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 May demand fees in advance, § 4662: 1864.  
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   For defense in criminal cases to be paid by county, § 5492: 2106.  
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   On preliminary examination, testimony of, §§ 5225, 5226: 1996.

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- Bound to appear, §§ 5232-5235: 1998.
- Before grand jury, subpoenas for, § 5262: 2005.
- Refusing to testify, how dealt with, § 5270: 2006.
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- Names to be indorsed on indictment, §§ 5276, 5277: 2008.
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- Married, liable for arson upon property of husband, § 4783: 1900.
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- Protection of, § 2552: 887. S. § 2551: 266.

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**Words and Phrases:**

- Construction of, in statutes, general rule as to, § 48, ¶ 2: 123.
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- "Administrator," § 48, ¶ 21: 125.
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- "Animals," as used in chapter on domestic animals, § 2311: 801.
- "Bond," § 48, ¶ 20: 124.
- "Clerk;" "clerk's office," § 48, ¶ 25: 125.
- "Company," in militia, § 2207: 776.
- "Company," in assessment of taxes, S. § 1330-f: 119; 1342-f: 127; § 1346-i: 130.
- "Collateral heirs," S. § 1467-c: 145.
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- "Election," "general," "city," "special," § 1089: 408.
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- "Family," of officer of state institution entitled to supplies for, S. § 2727-a38: 305.
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- "Heirs," or "legal heirs," in life insurance policies, § 3313: 1190.
- "Heretofore," and "hereafter," as used in Code, § 54: 127.
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- "Owner," in chapter on domestic animals, § 2311: 801. In mechanics' lien law, § 3096: 1112.
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**Y**

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